

2003

# Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements

Emily Fiftal

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## Recommended Citation

Emily Fiftal, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 Case W. Res. L. Rev. 503 (2003)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol54/iss2/6>

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## NOTES

### RESPECTING LITIGANTS' PRIVACY AND PUBLIC NEEDS: STRIKING MIDDLE GROUND IN AN APPROACH TO SECRET SETTLEMENTS

The Supreme Court of the United States has repeatedly identified a strong public policy favoring the private settlement of disputes, largely due to perceived problems of expense and delay caused by an increasing amount of litigation and the resulting overcrowding of this country's courts.<sup>1</sup> It is well recognized that most filed cases do indeed settle; the number of federal civil cases that culminate in trial was estimated at only 4% in 1991, a figure that is thought to apply to state courts as well.<sup>2</sup> Two-thirds of filed civil cases settle without a judicial ruling.<sup>3</sup> More recent studies suggest that this trend in favor of settlement continues.<sup>4</sup> While many scholars argue that settlement is not preferable to adjudication and that courts therefore should not encourage settlement, settlement will undoubtedly continue to occur at a high rate, and thus it is necessary to consider the appropriate relationship between courts and private settlement.<sup>5</sup>

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<sup>1</sup> Brian T. FitzGerald, Note, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 406 (1990); see, e.g., *Marek v. Chesny*, 473 U.S. 1, 12 (1985) (Powell, J., concurring) ("[P]arties to litigation and the public as a whole have an interest – often an overriding one – in settlement rather than exhaustion of protracted court proceedings.").

<sup>2</sup> Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and the Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994).

<sup>3</sup> *Id.* at 1342; see also Blanca Fromm, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664 (2001) (quoting Galanter & Cahill's statistics).

<sup>4</sup> Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 402 n.11 (1999) (citing Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 1-2, 63 n.2 (1996) (citing a 1995 study by Professor Theodore Eisenberg at the National Center for State Courts)).

<sup>5</sup> See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619,

During settlement, often one or more of the parties involved will not agree to settle without assurance that the terms of settlement will remain confidential.<sup>6</sup> Plaintiffs may want to protect their privacy or may be willing to agree to secrecy in exchange for greater consideration; defendants may want to avoid exposing themselves to a flood of litigation by similarly situated plaintiffs who learn that the defendant may be willing to pay.<sup>7</sup>

While settlement terms are typically considered a private contractual matter between parties, problems with settlement confidentiality arise when the presumably public court system is used to further settlement or when settlement information comes into a court's possession. Frequently parties choose to file their settlement so that the court will issue a consent decree encompassing the settlement terms and therefore retain jurisdiction; parties can then later enforce the agreement through the court's contempt power without filing a new lawsuit.<sup>8</sup> Though the Supreme Court of the United States has addressed the issue of public access to discovery documents,<sup>9</sup> the Court has not addressed confidentiality of settlement terms when such terms are made known to a court.<sup>10</sup> Jurisdictions vary regarding what standard is applied to determine whether a court will recognize settlement confidentiality when parties request it, and thus whether the court will prevent public access to the documents at issue.<sup>11</sup> Some observers who claim to represent the public argue that settlements often conceal information in which the public has an interest, especially in cases that

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2642, 2647 (1995) (revisiting Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), arguing that Fiss's arguments do not necessarily support the elimination of all settlements, but rather can support only the elimination of "wrong" settlements — those that do not fulfill other values central to public life, such as openness, political transparency, legal justice, and the creation of public good).

<sup>6</sup> Anne-Therese Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 117 (1990); FitzGerald, *supra* note 1, at 406-07.

<sup>7</sup> Bechamps, *supra* note 6, at 117; Sharon L. Sobczak, *To Seal or Not to Seal? In Search of Standards*, 60 DEF. COUNS. J. 406, 407 (1993).

<sup>8</sup> Bechamps, *supra* note 6, at 119.

<sup>9</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (holding that a protective order can be issued regarding pretrial discovery material if good cause is shown). The Court, however, focused on the litigant's First Amendment right to disseminate discovery information, rather than the public's First Amendment right of access. FitzGerald, *supra* note 1, at 389-90. FitzGerald states that the Court left open the possibility that a First Amendment right may arise when an interested third party seeks access and that strong dicta indicates that a constitutional analysis should be applied in the granting of orders to seal public record. *Id.* at 390.

<sup>10</sup> See FitzGerald, *supra* note 1, at 387 ("[T]he federal courts have not created separate standards for granting the various types of protective orders. Instead, they have focused primarily on the context of information dissemination during the discovery process.").

<sup>11</sup> Bechamps, *supra* note 6, at 120.

expose potential health and safety hazards, and that settlement information should thus be subject to public access.<sup>12</sup>

Many solutions to the problem of settlement confidentiality have been proposed by courts and scholars, including bright-line rules in support of either confidentiality or access, balancing tests using various factors, and ethical rules.<sup>13</sup> Some proposed solutions have been implemented, such as statutory and court-made presumptions of access.<sup>14</sup> Recently, the U.S. District Court for the District of South Carolina became the first federal district to adopt a bright-line rule making any settlement filed with the court a public record,<sup>15</sup> and media attention surrounding this rule has renewed interest in how courts should handle confidential settlement information.<sup>16</sup> Recent voluminous media coverage has scrutinized the use of confidential settlements by Catholic priests and other religious figures in cases of alleged sexual abuse.<sup>17</sup>

This Note argues that when a court determines whether settlement terms will remain confidential, the use of a blanket, bright-line rule, or even an across-the-board balancing test for all types of settlements, is not appropriate due to the unique public interest in certain types of cases. For most cases, a general balancing approach should be used and confidentiality should usually be re-

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<sup>12</sup> E.g., ASS'N OF TRIAL LAW. OF AM. & ROSCOE POUND INST., *SECRECY KILLS: HOW GAG ORDERS AND SECRECY AGREEMENTS AFFECT JUSTICE AND JOURNALISM* (2001) (presenting an Internet project containing a collection of resources from the two anti-secrecy groups), at <http://atla.org/secrecy/data/toc.aspx>; LITIGATION GROUP, PUBLIC CITIZEN, OPEN COURT PROCEEDINGS: CHALLENGES TO PROTECTIVE ORDERS, at [http://www.citizen.org/cmep/energy\\_enviro\\_nuclear/articles.cfm?ID=1068](http://www.citizen.org/cmep/energy_enviro_nuclear/articles.cfm?ID=1068) (last visited Sept. 17, 2003).

<sup>13</sup> For example, "sunshine" requirements have been implemented in Florida and Texas. In Florida, a court order or private settlement cannot conceal information regarding a "public hazard." FLA. STAT. ANN. § 69.081 (West Supp. 2003). In Texas, a presumption of access is created regarding court records, which are broadly defined to include even unfiled settlement agreements that address certain subjects. TEX. R. CIV. P. §§ 76a(1), (2)(a)-(b) (Vernon Supp. 2002). Laurie Dore, for example, defines balancing factors that should be used specifically in the settlement stage of litigation. Dore, *supra* note 4. Richard Zitrin, for example, argues that the development of ethical rules is a better solution to the problems of secret settlement than are statutes or court rules. Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, PROF. LAW., Summer 2001, at 1. These solutions are addressed later in this Note.

<sup>14</sup> See, e.g., FLA. STAT. ANN. § 69.081; TEX. R. CIV. P. § 76a; *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (holding that settlement agreements filed with the court are subject to public access absent a compelling interest in confidentiality); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (holding that the public has access to those records actually filed with a court).

<sup>15</sup> D.S.C. LOCAL CIV. R. 5.03(C) (effective Nov. 1, 2002), at <http://www.scd.uscourts.gov/Notices/LR503.pdf>.

<sup>16</sup> E.g., *60 Minutes II: Secret Settlements* (Internet coverage of CBS television broadcast, Jan. 15, 2003) (providing the lead story on 60 Minutes II with Dan Rather, which addressed settlement confidentiality and the South Carolina rule), at <http://www.cbsnews.com/stories/2003/01/15/60II/main536641.shtml>; see *infra* notes 218-31 and accompanying text.

<sup>17</sup> See *infra* notes 269-89 and accompanying text.

spected. However, several categories of settled cases should be identified as uniquely important to the public, such as product liability and sexual abuse cases, and those cases should be subjected to different balancing standards that account for the strong public interest in the information. However, due to the difficulty of concretely defining such categories and to the possibility of extreme factual situations, some judicial discretion remains necessary, and a bright-line rule even for the enumerated categories is not appropriate. This definition of a general balancing test and a special balancing test for certain types of settlements should be achieved through the development of a court rule.

Part I describes current judicial and legislative approaches taken in regard to the confidentiality of settlement agreements. Part II describes problems with these current systems. Part III describes reforms that have been proposed by different scholars and by lawmakers in various jurisdictions. Part IV explains how those reforms are inadequate and proposes two balancing tests that take into account the unique public interests that arise in certain types of settled cases. Part V applies the proposed balancing tests to several situations, such as the recent Catholic priest sexual abuse scandal, and demonstrates how the proposed rule achieves appropriate results.

## I. THE CURRENT SITUATION

Secrecy in court is typically achieved via one of three avenues. First, all parties may stipulate or one party may request that the court issue a protective order that restricts the dissemination of discovery materials. Second, sealing orders prevent public access to either certain court records or to an entire trial, including a jury verdict or court decision. Lastly, settlements may contain a confidentiality provision that is recognized and/or enforced by a court.<sup>18</sup> Most courts apply the same standard when deciding to recognize secrecy in each of these three situations, although the situations occur at different stages of the judicial process.<sup>19</sup>

### A. *Different Views of the Judicial Function and Other Confidentiality Arguments*

The confidentiality rule adopted in a given jurisdiction may depend on what that jurisdiction's rule-making court or legislature perceives to be the primary function of courts in society.<sup>20</sup> Some

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<sup>18</sup> Dore, *supra* note 4, at 283.

<sup>19</sup> FitzGerald, *supra* note 1, at 387.

<sup>20</sup> Sobczak, *supra* note 7, at 407-08.

law-making bodies and some scholars recognize the traditional role of dispute resolution as the primary function of civil courts. By this view, courts do not represent the interests of the general public, despite being publicly funded institutions. These analysts argue that a reduction in the use of confidentiality in courts is inappropriate if the reduction is motivated by a perceived need to disseminate information to the public. Such dissemination is a mere secondary effect of the current system and thus is an improper aim for the courts.<sup>21</sup> Confidentiality is considered desirable because it expedites the dispute resolution process by making parties more willing to exchange information and engage in candid negotiation.<sup>22</sup>

Similarly, some scholars argue for the continued acceptance of confidentiality in courts because existing executive and administrative agencies at the local, state, and federal levels are believed to be the appropriate institutions to disseminate necessary information to the public.<sup>23</sup> For example, federal statutes such as the Food, Drug, and Cosmetic Act<sup>24</sup> and the Consumer Product Safety Act<sup>25</sup> require the reporting of health and safety information and grant federal authorities the power to investigate and disseminate information to the public. Some argue that if problems exist regarding public access to information, changes should be made through such agencies; agency responsibilities should not be shifted to the courts.<sup>26</sup>

In addition to arguments regarding the court's primary aim of dispute resolution, the facilitation of settlement is important because settlement avoids the costs of trial for both the litigants and the overburdened judicial system. Settlement creates finality on which people can decide their actions, and even "results in higher levels of satisfaction to the litigants, having determined their own solution to their dispute rather than being subjected to a judicially-created solution."<sup>27</sup> The right to contract freely is said to include the right to bargain regarding confidentiality.<sup>28</sup>

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<sup>21</sup> E.g., Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 431 (1991).

<sup>22</sup> *Id.* at 463-77.

<sup>23</sup> *Id.* at 488-89; see also Richard A. Epstein, Editorial, *The Disclosure Dilemma: Why a Ban on Secret Settlements Does More Harm Than Good*, BOSTON GLOBE, Nov. 3, 2002 (arguing that government agencies should have the duty to protect the public in situations like the Firestone/Ford tire defect cases and the Roman Catholic church child molestation cases), available at <http://foi.missouri.edu/statefoi/disclosureddilemma.html> (last visited Oct. 5, 2003) (on file with Case Western Reserve Law Review).

<sup>24</sup> 21 U.S.C. §§ 301-397 (2000).

<sup>25</sup> 15 U.S.C. §§ 2051-2084 (2000).

<sup>26</sup> Miller, *supra* note 21, at 489.

<sup>27</sup> Christine M. Tomko, Comment, *Can You Keep a Secret?: Discoverability and Admis-*

Critics of confidentiality contend that governmental regulatory agencies have not “yet fulfilled their promise” to protect the public and may be inadequate to do so.<sup>29</sup> Until such agencies provide sufficient protection, our system is unsatisfactory if it requires courts to remain silent while more of the public is harmed.<sup>30</sup> Other scholars and law-making bodies believe that as public institutions, courts should promote broader social goals through the litigation process. These analysts argue that judges should not keep information confidential if the public would benefit from disclosure, even when the parties agree to such confidentiality. Public benefits include the prevention of duplicated discovery efforts and the notice of public safety and health hazards. As the wealthiest and most widely influential parties, such as big corporations, have the resources necessary to negotiate for confidentiality, and because those parties anticipate suffering greatly from negative publicity

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*sibility of Confidential Settlement Agreement Amounts in Ohio*, 52 CASE W. RES. L. REV. 833, 850 (2002).

<sup>28</sup> See *infra* note 243 and accompanying text.

<sup>29</sup> Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL’Y 53, 59 (2000).

<sup>30</sup> Judge Jack Weinstein describes the inadequacies of agency protection:

Although the Consumer Product Safety Act (“CPSA”) requires manufacturers to report defects that have or may cause serious injury or death, substantial underreporting appears to be the rule. Just a few hundred product hazard reports from nearly two million businesses engaged in manufacturing, distributing, or selling consumer products are said to be received annually.

*Id.* at 59 (footnotes omitted) (citing Michael R. Lemov & Malcolm D. Woolf, *Underreporting Defects Is Risky*, NAT’L L.J., Dec. 14, 1992, at S6).

Additionally, while some state statutes do require parties like professional liability insurers, self-insured health care providers, and uninsured providers to report settlements to a state authority, most states do not require the state boards to provide that information to the general public. Fromm, *supra* note 3, at 695-96 (citing, *inter alia*, 40 PA. CONS. STAT. ANN. § 1301.841-A(c) (West 1999) (repealed Mar. 20, 2002)). For example, a Pennsylvania statute currently requires medical professional liability insurers and self-insured providers to report settlements to their licensing board, but the information is not considered public information until it is used in a formal disciplinary proceeding. PA. STAT. ANN. tit. 40, § 1303.746 (West Supp. 2003). Another Pennsylvania statute allows licensing boards access to patient medical records despite a confidential settlement agreement between the patient and the insurer or provider. PA. STAT. ANN. tit. 40, § 1303.906 (West Supp. 2003). However, materials used solely for investigation by the Pennsylvania State Board of Medicine or the State Board of Osteopathic Medicine are confidential. PA. STAT. ANN. tit. 40, § 1303.907 (West Supp. 2003). In July 2003, a Pennsylvania bill mandating the development of a public data repository including medical malpractice settlements over \$50,000, PA. H.B. 158 (2003), went to the Senate Committee on the Judiciary.

Florida does make such information public record. Fromm, *supra* note 3, at 695-96 (citing, *inter alia*, FLA. DEP’T OF FIN. SERVS., PROFESSIONAL LIABILITY CLOSED CLAIMS DISCLAIMER AND NOTICE (“The reports on this site stem from patient or client allegations and are public record.”), available at <http://doi.state.fl.us/Liability/disclaimer.htm> (last visited Sept. 17, 2003) (on file with the Case Western Reserve Law Review)). Some states will allow scholars access for research and educational use. See, e.g., ARIZ. REV. STAT. ANN. § 32-1855.02(C) (West 1999) (“The board shall maintain the reports filed in accordance with this section as confidential records. Statistical data derived from these reports shall be released only for bona fide research or educational purposes.”).

and additional litigation, commentators claim that the very settlement information that would most help the public is the most likely to be confidential.<sup>31</sup> The public does not have access to formal and informal attorney networks through which confidential settlement information may be exchanged and even published, such as bar associations and alumni networks. Nor does the public have access to first-hand information available to "repeat players" – attorneys and defendants who have previously participated in similar litigation.<sup>32</sup> Additionally, it is argued that the public has an interest in monitoring the use of public resources, including the functioning of courts.<sup>33</sup>

### *B. Two Potential Sources of a Public Right of Access*

Proponents of public access to court records and settlement agreements advance two types of reasons for a public right of access, deriving alternatively from the Constitution of the United States and from the common law.<sup>34</sup> The rights of access under the Constitution and the common law are similar, though, and many courts confuse the two sources or subject the rights derived from the two sources to identical analyses.<sup>35</sup> Most opposition to confidentiality based on a public interest argument comes not from litigants but from the news media, the plaintiffs' bar, and third-party intervenors who claim to represent the general public.<sup>36</sup>

#### *1. Constitutional Arguments*

Those who make a constitutional argument generally assert that court confidentiality implicates the First Amendment, which empowers the public as a "judicial watchdog."<sup>37</sup> The Supreme Court of the United States indeed recognized a qualified constitutional right of access to criminal trials and other associated proceedings in *Richmond Newspapers, Inc. v. Virginia*,<sup>38</sup> and several circuits have analogized this rule to apply to civil trials.<sup>39</sup> The Su-

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<sup>31</sup> Especially in situations involving exceptionally large settlements, plaintiffs may not want others to know of the amount received, and defendants may be concerned about the encouragement of future lawsuits; therefore, large settlements may be more likely to be confidential. Fromm, *supra* note 3, at 689-90.

<sup>32</sup> *Id.* at 697-700.

<sup>33</sup> Dore, *supra* note 4, at 308-09; Miller, *supra* note 21, at 430, 477.

<sup>34</sup> Bechamps, *supra* note 6, at 119.

<sup>35</sup> *Id.* at 120; Dore, *supra* note 4, at 321.

<sup>36</sup> Sobczak, *supra* note 7, at 408.

<sup>37</sup> *Id.*

<sup>38</sup> 448 U.S. 555 (1980).

<sup>39</sup> In *Richmond Newspapers*, the Court limited its holding to the criminal context, but the Court stated in a footnote that "historically both civil and criminal trials have been presumptively open." *Id.* at 580 n.17. For a case in which lower federal courts have thus extended the



preme Court, however, has subsequently applied its *Richmond Newspapers* rule only to the criminal trial process and never to court records or to civil proceedings.<sup>40</sup>

Another First Amendment argument has been made in the context of orders protecting the confidentiality of discovery materials in a civil case. Under this argument, such confidentiality orders can be likened to prior restraints on a litigant's speech, and thus requests for protective orders should be subject to strict scrutiny analysis rather than to the "good cause" standard articulated in Federal Rule of Civil Procedure 26(c).<sup>41</sup> The Supreme Court rejected this analogy between discovery-related protective orders and prior restraints in *Seattle Times Co. v. Rhinehart*,<sup>42</sup> a case in which the court upheld a protective order that addressed discovery material containing information about members and donors of a religious organization. The Court reasoned that because litigants do not have an independent right to discovery material outside of the litigation context and because protective orders only limit the dissemination of material obtained through discovery, court control over discovery materials need not be held to "exacting First Amendment scrutiny."<sup>43</sup>

The Court in *Seattle Times* applied a two-prong test to determine whether or not a litigant has a First Amendment right to dis-

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holding to civil proceedings, see *Westmoreland v. Columbia Broad. Sys.*, 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985):

[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*, because public access to civil trials enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and heightens public respect for the judicial process, while permitting the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self government.

*Id.* (quotations and citations omitted); see also, e.g., *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) ("Although we reject the suggestion that the [Freedom of Information Act] places limitations on the District Court's discretion to seal court documents, the First Amendment and the common law do limit judicial discretion."), *cert. denied*, 465 U.S. 1100 (1984). These and additional cases are listed and analyzed in Bechamps, *supra* note 6, at 134-38 and accompanying footnotes; Sobczak, *supra* note 7, at 408, 420 n.16.

<sup>40</sup> See *Press-Enter. Co. v. Superior Court* (Press-Enter. II), 478 U.S. 1 (1986) (transcripts of a preliminary hearing in a criminal murder prosecution); *Press-Enter. Co. v. Superior Court* (Press-Enter. I), 464 U.S. 501 (1984) (transcript of jury selection voir dire proceedings in a rape and murder trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (testimony of a minor complainant in a rape trial). The Court has not explicitly refused to apply access to civil cases, but it has denied certiorari in civil cases in which the *Richmond Newspapers* rule has been extended. See, e.g., *Westmoreland*, 752 F.2d 16, *cert. denied*, 472 U.S. 1017 (1985); *Brown & Williamson Tobacco Corp.*, 710 F.2d 1165, *cert. denied*, 465 U.S. 1100 (1984). For an explanation of Supreme Court cases subsequent to *Richmond Newspapers*, see Bechamps, *supra* note 6, at 138; Sobczak, *supra* note 7, at 408.

<sup>41</sup> Miller, *supra* note 21, at 436.

<sup>42</sup> 467 U.S. 20 (1984).

<sup>43</sup> *Id.* at 33.

seminate information obtained only for purposes of court proceedings: first, whether the material was a source of information traditionally available to the public; and second, whether the protective order furthered a substantial government interest.<sup>44</sup> Regarding the discovery materials at issue, the Court determined that discovery materials were not traditionally available to the public and that the protective orders furthered a substantial governmental interest in protecting the litigants from harm that could result from dissemination of the discovery information.<sup>45</sup>

The Supreme Court has not addressed confidentiality situations in civil cases outside of the discovery context.<sup>46</sup>

## 2. *Common Law Arguments*

While courts do not generally recognize a constitutional right of access, a common law right of access is indeed recognized by most courts.<sup>47</sup> The common law has presumed public access to all unsealed materials filed with a court, and the presumption has been applied to pretrial hearing transcripts, administrative proceeding records, documents filed in support of motions, and submitted settlement agreements.<sup>48</sup> Justifications for the presumption include providing public education about the court system, enabling the public to serve as a watchdog regarding general court functioning and regarding the use of public resources, supporting an image of judicial fairness, and recognizing a "general public interest" in certain types of cases.<sup>49</sup>

Such a right of access has commonly been applied to trial documents and documents filed in favor of dispositive motions on the merits, but it has not commonly been applied to documents that have no direct relation to court action. This limited application of the right may be due to the belief that the arguments for public access, such as public education and public monitoring, are best achieved when the court has taken some action.<sup>50</sup> Additionally, a right of public access may not apply to filed documents that may

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<sup>44</sup> This two-prong test is derived from the test that the Supreme Court developed for First Amendment claims of access to criminal proceedings: first, the Court considers the historical accessibility of the stage of the proceeding at issue; and second, the Court considers the functional utility of public access – "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8; *Dore*, *supra* note 4, at 321 n.152.

<sup>45</sup> *Press-Enter. II*, 478 U.S. at 33-37.

<sup>46</sup> See *supra* notes 39-40 and accompanying text.

<sup>47</sup> *Bechamps*, *supra* note 6, at 120.

<sup>48</sup> *Id.*; *Sobczak*, *supra* note 7, at 409.

<sup>49</sup> *Bechamps*, *supra* note 6, at 134; *Sobczak*, *supra* note 7, at 409.

<sup>50</sup> *Sobczak*, *supra* note 7, at 410.

"become a vehicle for improper purposes."<sup>51</sup> In *Nixon v. Warner Communications, Inc.*,<sup>52</sup> the Supreme Court suggested that White House tape recordings obtained by subpoena over opposition of the sitting President could be held inaccessible due to concerns about commercial exploitation of the tapes.<sup>53</sup>

As the public rights of access based on the Constitution and the common law are generally treated identically by courts, this Note will not address from where a public right of access to confidential settlement information more appropriately derives.

### C. The Baseline Confidentiality Rule in the Federal Courts

The status quo or baseline confidentiality rule in the federal civil system emphasizes a trial court's discretion to address confidentiality on a case-by-case basis.<sup>54</sup> Regarding the issue of discovery confidentiality, Rule 26(c) allows a court, "for good cause shown," to block discovery completely or to provide for confidentiality by limiting, for example, the methods of discovery, the subject matter discovered, and who may be present at discovery.<sup>55</sup> According to Rule 26(c), the court may mandate that discovery materials be sealed and opened only by the court, or that certain information not be revealed or only be revealed in a designated way. In following Rule 26(c), federal courts have generally adopted a balancing test regarding the confidentiality of discovery materials, allowing the court to issue a protective order mandating confidentiality if there is "good cause" for doing so and if a party's

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<sup>51</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). The Court cited cases suggesting that all material disclosed in private litigation, even if filed with the court, is not presumptively public:

It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

*Id.* (citations omitted).

<sup>52</sup> 435 U.S. 589 (1978).

<sup>53</sup> *Id.* at 600-03. The Court, however, seemed to base its decision not to disclose the tapes on the fact that Congress had already established an administrative procedure, through the Presidential Recordings Act, to screen public access to presidential tapes and documents. *Id.* at 603; see also Sobczak, *supra* note 7, at 410 (interpreting *Nixon* to suggest that pretrial proceedings differ in stature from actual trial proceedings for purposes of disclosure).

<sup>54</sup> Bechamps, *supra* note 6, at 118 ("American courts have long recognized that decisions concerning access to court records are committed to the discretion of the trial judge."); Dore, *supra* note 4, at 310.

<sup>55</sup> FED. R. CIV. P. 26(c).

interest in confidentiality outweighs harm that might occur to the other party.<sup>56</sup> Federal law does not enumerate the specific factors to be balanced or their respective weights, so the trial judge is generally given wide discretion regarding what to balance and how.<sup>57</sup>

The burden initially rests on the party opposing discovery to demonstrate that Rule 26 applies, such as by showing the involvement of “a trade secret or other confidential research, development or commercial information,” that “good cause” exists for the issuance of a protective order, and that a particularized harm might result from disclosure. The burden then shifts to the party seeking discovery to show relevance and the need for the information. If the party seeking discovery demonstrates both relevance and need, the court then balances that party’s need for information against injury that might result from disclosure. If the court indeed determines from this balancing that the contested discovery should occur, the court has discretion to determine if that discovery ought to be limited in any way.<sup>58</sup> Since the Supreme Court has not defined a test for confidentiality situations outside of the discovery context, this test can be considered a baseline for settlement confidentiality as well.

#### *D. Different Approaches to Settlement Confidentiality in Different Jurisdictions*

Supporters of applying such a balancing test to the settlement context, and thus of maintaining the status quo, argue that by granting the trial court wide discretion to determine on a case-by-case basis the factors to balance and to fashion an appropriate sealing order, the existing practice sufficiently allows courts to consider and protect the public interest.<sup>59</sup> On the other hand, advocates of legislative or procedural reform argue that courts cannot properly consider the benefits of public access due to a self-interest in docket clearing, a desire to respect the wishes of the immediate parties, and the push for judicial management of trials and judicial encouragement of settlement.<sup>60</sup> In general, different jurisdictions have taken differing approaches in relating the Rule 26 discovery analysis to the context of confidential settlements. A few jurisdictions have developed a statutory source of a public right of access to confidential settlement information. Others have

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<sup>56</sup> Miller, *supra* note 21, at 432-36.

<sup>57</sup> *Id.* at 435-36.

<sup>58</sup> *Id.* at 433-34 (quoting FED. R. CIV. P. 26(c)).

<sup>59</sup> Dore, *supra* note 4, at 310.

<sup>60</sup> *Id.* at 310-11.

used procedural rules to achieve the same end. Attempts at federal reform, however, have been largely unsuccessful, and only a handful of states have limited the use of confidential settlements in these ways.<sup>61</sup>

### 1. State Approaches to a Right of Access

Florida, which adopted a statute, and Texas, which adopted a procedural rule, were the first states to impose "sunshine" requirements.<sup>62</sup> The Florida statute prohibits a court from entering any order or judgment that "has the purpose or effect of concealing a public hazard or any information concerning a public hazard," or "any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard."<sup>63</sup> The Florida statute also voids any provision of a private settlement that conceals information concerning public hazards.<sup>64</sup>

Texas has promulgated the broadest sunshine reform.<sup>65</sup> Texas Rule of Civil Procedure 76a creates a presumption of public access to court records, which are defined broadly to include "settlement agreements not filed of record" that "have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."<sup>66</sup> The rule does not cover references to monetary settlement amounts or documents filed in camera to obtain a discovery ruling.<sup>67</sup>

Other states have passed narrower legislation and rules covering judicial records,<sup>68</sup> settlements with a governmental entity,<sup>69</sup>

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<sup>61</sup> Attempts at federal legislative reform have been unsuccessful. 2 MICHAEL DORE, *LAW OF TOXIC TORTS* ch. 25, § 7, at 25-21 (1987 & Supp. 2002); see Luban, *supra* note 5, at 2651 (citing Senator Kohl's proposed Sunshine in Legislation Act, S. 374, 104th Cong. (1995), which was voted down 51-49 in the Senate). See *infra* Part III.C. for a discussion of the bright-line procedural rule newly adopted by the U.S. District Court for the District of South Carolina, the first rule of its kind adopted by a federal court.

<sup>62</sup> 2 DORE, *supra* note 61, at 25-21.

<sup>63</sup> FLA. STAT. ANN. § 69.081(3) (West Supp. 2003).

<sup>64</sup> *Id.* § 69.081(4).

<sup>65</sup> Dore, *supra* note 4, at 310.

<sup>66</sup> TEX. R. CIV. P. § 76a(1), (2)(a)-(b) (Vernon Supp. 2002).

<sup>67</sup> *Id.* § 76a(2)(a)(1), (b).

<sup>68</sup> See, e.g., DEL. SUPER. CT. R. 9(bb) (2002) (requiring a judicial determination that good cause exists for continued sealing of records); GA. UNIF. SUPER. CT. R. 21.1 (West 2003) (establishing procedural requirements for the sealing of judicial records); MICH. CT. R. 8.105(D) (LEXIS 1998) (limiting court's discretion to seal any "documents and records of any nature that are filed with the clerk"). For more state approaches, see Dore, *supra* note 4, at 314.

<sup>69</sup> See N.C. GEN. STAT. §§ 132-1.3(a)-(b) (2001) (prohibiting agencies of the state government or its subdivisions from entering into confidential settlements except in a medical malpractice action against a hospital, and allowing a judge to seal government settlements only upon the finding of an "overriding interest"); OR. REV. STAT. § 30.402(1) (2001) (prohibiting a public body from entering into a confidential settlement).

certain types of public hazards,<sup>70</sup> and sharing of information in related litigation.<sup>71</sup> For example, New York Uniform Trial Court Rule section 216.1 prohibits the sealing of court records filed with the clerk except upon a written finding of good cause and the consideration of the public interest.<sup>72</sup> The court is always required to make an independent determination of good cause.<sup>73</sup>

## 2. *The Federal Courts' Approaches*

### a. *The Third Circuit*

Judicially created rules vary across the federal circuits. The United States Court of Appeals for the Third Circuit has a distinctive rule, based on the common law, that presumptively grants public access to anything actually filed with, and retained by, a court, including settlement information.<sup>74</sup> In *Pansy v. Borough of Stroudsburg*,<sup>75</sup> the Third Circuit reiterated that "a settlement agreement deemed a judicial record is accessible under the right of access doctrine," and that in such cases "the strong presumption of access outweigh[s] the interest in promoting settlements."<sup>76</sup> The actual act of filing material with the court, or the incorporation of the material into court proceedings, determines what is a judicial record:

[W]hen a settlement agreement is not filed with the court, it is not a judicial record for the purposes of the right of access doctrine. . . . [If] the Settlement Agreement [has] not been filed with, placed under seal, interpreted or enforced by the district court, it [is] not a judicial record.<sup>77</sup>

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<sup>70</sup> See ARK. CODE ANN. § 16-55-122 (Michie Supp. 2001) (voiding settlement provisions that restrict a person's right to disclose an environmental hazard); WASH. REV. CODE ANN. § 4.24.611 (West Supp. 2003) (allowing the confidential settlement of product liability or hazardous substance claims only when a court finds that such confidentiality is in the public interest).

<sup>71</sup> See VA. CODE ANN. § 8.01-420.01 (Michie 2000) (providing that protective orders issued in personal injury or wrongful death cases shall not prohibit the sharing of discovery in similar or related matters).

<sup>72</sup> N.Y. UNIF. TRIAL CT. R. § 216.1 (2001).

<sup>73</sup> *In re Will of Hofmann*, 727 N.Y.S.2d 84, 85 (App. Div. 1st Dep't 2001) ("Confidentiality is clearly the exception, not the rule, and the court is always required to make an independent determination of good cause."); *Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 711 N.Y.S.2d 419, 425 (App. Div. 1st Dep't 2000) (holding that an order to seal court records should rest on a sound basis or legitimate need to take judicial action and that the burden to demonstrate such a need rests on the party seeking the sealing order).

<sup>74</sup> Sobczak, *supra* note 7, at 410.

<sup>75</sup> 23 F.3d 772 (3d Cir. 1994).

<sup>76</sup> *Id.* at 781.

<sup>77</sup> *Id.* (quoting *Enprotech Corp. v. Renda*, 983 F.2d 17, 20 (3d Cir. 1993)); see also *Cen-*

Because the Third Circuit “focus[es] on the technical question of whether a document is physically on file with the court” to determine judicial record status,<sup>78</sup> a court’s entering of a confidentiality order over documents does not render those documents “judicial records” unless the documents are filed with the court.<sup>79</sup> Additionally, documents cease to be judicial records once they are no longer part of the court file, such as in situations in which documents are returned to the parties.<sup>80</sup>

In *Pansy*, the Third Circuit recognized that courts have “inherent power” to grant confidentiality orders over materials, including settlement agreements, regardless of whether those materials are contained in the court files,<sup>81</sup> but it criticized the practice of automatically issuing confidentiality orders because the parties agree to secrecy:

[S]imply because courts have the power to grant confidentiality does not mean that such orders may be granted arbitrarily. Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders or the countervailing public interests which are sacrificed by the orders. Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement.<sup>82</sup>

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dent Corp. v. Forbes, 260 F.3d 183, 192 (3d Cir. 2001) (applying the *Pansy* definition of judicial records to attorney bids submitted to the district court); *Jackson v. Del. River & Bay Auth.*, 224 F. Supp. 2d 834, 839 (D.N.J. 2002) (holding that a settlement agreement is not a judicial record where it was never presented to the court or filed, interpreted, or enforced by the court, applying the *Pansy* definition of judicial records).

It is interesting to note that in *Pansy*, the court quoted precedent indicating that in addition to filing, a court must enforce an agreement before it is accessible to the public: “Moreover, the Agreement will not become a part of the public record unless and until the district court may order the parties to comply with its terms.” *Pansy*, 23 F.3d at 781 (quoting *Enprotech Corp. v. Renda*, 983 F.2d 17, 21 (3d Cir. 1993)). However, the Third Circuit later clearly stated in *Cendent Corp.* that filing alone is enough to confer judicial record status. 260 F.3d at 192 (“The status of a document as a ‘judicial record,’ in turn, depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings. . . . [F]iling clearly establishes such status . . .”). The district court in *Jackson* also seemed to indicate that filing alone is sufficient. *Jackson*, 224 F. Supp. 2d at 839 (“Here, it is undisputed that this Court never filed, interpreted, or enforced the eventual formal written settlement agreement. No tenet of law required the settlement agreement to be filed with the court, and it was not.”).

<sup>78</sup> *Pansy*, 23 F.3d at 782.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 785.

<sup>82</sup> *Id.* at 785-86.

Instead, a court should balance several factors when determining whether "good cause" is shown and thus whether a confidentiality order regarding settlement should be issued, including the parties' interest in privacy, whether the information is sought for a proper or improper purpose, whether the information at issue is important to public health and safety, and whether a public official is a party to the case.<sup>83</sup> Party reliance on confidentiality and a public interest in encouraging settlement should not be given extra weight in the balancing test as "settlements will be entered into in most cases whether or not confidentiality can be maintained."<sup>84</sup> The court thus expressed the view that confidentiality is not essential for settlement.<sup>85</sup>

Overall, in the Third Circuit, a strong presumption of public access to judicial records exists, and possible exceptional circumstances in which confidentiality may be appropriate are suggested in the court's definition of balancing factors.<sup>86</sup>

#### *b. The Seventh Circuit*

The Third Circuit's focus on the actual filing of documents related to settlement, and therefore on the use of judicial resources, as determining public accessibility to settlement information seems to be increasingly common.<sup>87</sup> Recent cases in the Seventh Circuit support this concept of public access. In *Jessup v. Luther*,<sup>88</sup> a magistrate judge presided over settlement discussions between a former vice president of a public college and the college concerning termination of employment. The magistrate "approved" the parties' signed agreement, but did not issue a judicial order stating his approval, which would have resulted in the magistrate judge's retention of jurisdiction for later enforcement. Rather, he dismissed the suit with prejudice and sealed all documents related to the settlement.<sup>89</sup> In deciding whether to grant an intervenor newspaper's motion to unseal, Judge Posner first looked at whether the settlement was a judicial record, stating that First Amendment and public monitoring concerns create a strong presumption of public

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<sup>83</sup> *Id.* at 786-88.

<sup>84</sup> *Id.* at 788 (quotations omitted).

<sup>85</sup> *Id.* at 788, 790.

<sup>86</sup> See Dore, *supra* note 4, at 316 ("While party reliance upon confidentiality and its 'particularized' importance in effecting settlement remain proper considerations, they are not dispositive, and must instead be weighted against a number of equally (if not more) important non-party and public interests.").

<sup>87</sup> FitzGerald, *supra* note 1, at 408.

<sup>88</sup> 277 F.3d 926 (7th Cir. 2002).

<sup>89</sup> *Id.* at 927.



access to such documents.<sup>90</sup> He then looked at whether the parties stated a “compelling interest in secrecy,” listing several situations in which such a compelling interest in secrecy justifies the sealing of portions of, and sometimes all of, a judicial record: in cases containing trade secrets, informants, and children.<sup>91</sup> If such an interest in secrecy exists, the interest is balanced against competing interests on a case-by-case basis.<sup>92</sup> In the case at issue, the magistrate did not retain jurisdiction over the case, and thus his sealing order was no longer enforceable. Because “for some reason there [was] a copy of the agreement in [the court’s] files,” and because the parties did not present a compelling interest in secrecy, the Seventh Circuit allowed access to the settlement information in the court’s possession.<sup>93</sup> The court did note that the parties could have kept the settlement information private by stipulating dismissal under Federal Rule of Civil Procedure 41(a)(1)(ii) without filing the settlement with the court.<sup>94</sup>

The Seventh Circuit applied the *Jessup* rules in *Herrnreiter v. Chicago Housing Authority*,<sup>95</sup> a case regarding employment discrimination. An opinion by Judge Easterbrook held that the Chicago Housing Authority relinquished any claim to confidentiality when it made the enforcement of oral settlement terms the subject of litigation. By asking the court to enforce the agreement, the Housing Authority created a judicial record and thus opened the terms of the agreement to the public.<sup>96</sup> The court again recognized a short list of limited situations in which confidentiality may still be appropriate: cases involving trade secrets or national security issues.<sup>97</sup> The Housing Authority’s “desire to keep the amount of

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<sup>90</sup> *Id.* at 927-28.

<sup>91</sup> *Id.* at 928.

<sup>92</sup> *Id.* As a case-by-case balancing test is applied to each confidentiality situation, it is unclear whether the court intended its enumerated list of possible compelling interests to be exhaustive. See *infra* note 97 and accompanying text.

<sup>93</sup> *Jessup*, 277 F.3d at 929-30.

<sup>94</sup> *Id.* at 928. Rule 41(a)(1)(ii) states that an action may be dismissed without a court order if the plaintiff files a stipulation of dismissal signed by all of the parties who have appeared in the action. FED. R. CIV. P. 41(a)(1)(ii); see *infra* note 248.

<sup>95</sup> 281 F.3d 634 (7th Cir. 2002).

<sup>96</sup> *Id.* at 636-37; see also *Coolsavings.com, Inc. v. Brightstreet.com, Inc.*, No. 99-C5499, 2002 U.S. Dist. LEXIS 4960, at \*18-19 (N.D. Ill. Mar. 25, 2002) (stating that, under *Herrnreiter*, if “the parties were unable to produce a mutually agreeable settlement instrument without the Court’s assistance, their agreement becomes part of the Court and, therefore, the public record [regardless of the fact that] the parties have agreed that the settlement agreement should remain confidential”); *DeKalb Genetics Corp. v. Mycogen Plant Sci., Inc.*, 96 CV-50241, 2002 U.S. Dist. LEXIS 23128, at \*6-7 (N.D. Ill. Dec. 2, 2002) (denying intervenor motion to unseal settlement agreements because the agreements were not filed with the court and thus were not public documents; rather, they remained private contracts: “Put simply, the court cannot unseal what it does not have.”).

<sup>97</sup> *Herrnreiter*, 281 F.3d at 637. As in *Jessup*, it is unclear whether the court intended its

its payment quiet . . . to avoid looking like an easy mark" was not enough justification for confidentiality.<sup>98</sup> Again, the court stated that the parties could have ended the appeal and kept the settlement secret through stipulated dismissal.<sup>99</sup>

However, in the more recent case *Baxter International, Inc. v. Abbott Laboratories*,<sup>100</sup> the Seventh Circuit stated that this strong presumption of access does not apply to appellate court records in the same way that it applies to documents filed with a district court, and thus confidentiality must be analyzed independently at

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enumerated list of possible compelling interests to be exhaustive.

An exhaustive list of situations in which confidentiality may be appropriate on appeal was seemingly enumerated later by the Seventh Circuit in *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002): "In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of sexual assault), is entitled to be kept secret on appeal." The *Baxter* opinion, written by Judge Easterbrook, cited the court's earlier opinions in *Jessup* and *Herrnreiter* as supporting this rule. *Id.*

However, in an even more recent opinion of the Northern District of Illinois, Judge Posner described the *Jessup* rules much more broadly:

Although documents submitted to a court are presumptively available for public inspection in order to facilitate public monitoring of the courts, portions of documents that are shown to contain trade secrets, or other information that would cause undue private or public harm if disclosed, as by invading personal property gratuitously, may be kept under seal.

*SmithKline Beecham Corp. v. Pentech Pharm., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (citations omitted) (citing *Jessup* for both the presumption and exception portions of the rule). In *SmithKline Beecham*, Judge Posner granted a motion to seal a portion of a patent-related settlement between pharmaceutical companies based on concerns about unfair advantage unrelated to trade secrets or any other subject enumerated in *Baxter*:

[The term "trade secret"] suggests an idea or inventions having commercial value and reflecting investment by the firm seeking to maintain secrecy, such as a customer list or a secret manufacturing process. There is nothing of that sort in the [present] license agreement. The reason for secrecy is that it contains information about terms and conditions of the distributorship arrangement that the licensing agreement creates that might give other firms an unearned competitive advantage – unearned because the issue of public disclosure arises from the advantageous circumstance of the agreement's having become caught up in litigation and as a result having become filed in the court.

*Id.* Judge Posner then found the information to be such that "the American public does not need to know [it] in order to evaluate the handling of this litigation by the judiciary," and he accordingly granted the motion to seal. *Id.*

<sup>98</sup> *Herrnreiter*, 281 F.3d at 637.

<sup>99</sup> *Id.* In the recent Northern District of Illinois case *SmithKline Beecham*, an opinion by Judge Posner stated that when all parties sign a stipulation of dismissal, dismissal is automatic; no judicial action is required, and neither the stipulation nor the settlement agreement need to be submitted to the court. 261 F. Supp. at 1004. In *SmithKline Beecham*, however, one of three parties refused to stipulate dismissal, and thus *SmithKline* filed a motion to dismiss under Rule 41(a)(2). *Id.* The opinion stated that the court did not have the authority to deny dismissal of the suit between the stipulating parties, and the court would not have that authority even if it had concerns that the settlement agreement was contrary to public policy or otherwise illegal, because when all parties stipulate dismissal under Rule 41(a)(1)(ii), the court does not have the opportunity even to see the settlement agreement. *Id.* Rule 41(a)(2) states that an action can be dismissed upon order of the court, except where a defendant's counterclaim cannot remain pending for independent jurisdiction. FED. R. CIV. P. 41(a)(2).

<sup>100</sup> 297 F.3d 544 (7th Cir. 2002).

the appellate level.<sup>101</sup> The Seventh Circuit suggested that it would be willing to return some documents to the trial court in order to prevent inclusion in the appellate record and thus public disclosure, including those filed in error and those that had little influence on any district court decision:

Another thing that the parties might have done is pared down the appellate record. The strong presumption of public disclosure applies only to the materials that formed the basis of the parties' dispute and the district court's resolution. If documents have reached this court unnecessarily, the parties could have asked us to send them back. The court sometimes spontaneously orders documents returned in order to prevent unwarranted disclosure of commercially sensitive information. Keeping the documents in the district court is an especially attractive option when they contribute little to the resolution of the case yet are too voluminous to justify detailed examination on appeal.<sup>102</sup>

Therefore, the act of physically filing a document with an appellate court may not preclude confidentiality as it does at the district court level. As with the Third Circuit approach, the return of documents may protect a document from public access. However, information that is retained by the court and entered into the appellate record "normally is vital to the case's outcome" and is presumptively public.<sup>103</sup> The *Baxter* opinion thus includes in its confidentiality analysis factors not included in *Jessup* and *Herrnreiter* – the materiality of documents to the claims brought, and the extent to which the court in possession of the documents has relied on the documents to make judicial decisions toward the resolution of the claims. The consideration of these factors is based on the argument that more judicial resources are expended on material and influential documents, and that the public has a right to the information necessary to evaluate the outcomes of such expenditures: "How else are observers to know what the suit is about or assess the judge's disposition of it? Not only the legislature but

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<sup>101</sup> *Id.* at 545-46.

<sup>102</sup> *Id.* at 548. In contrast, in the district court case *SmithKline Beecham*, Judge Posner refused to seal even redacted portions of the agreement that had been revealed to the public through his opinion as "there the cat is out of the bag." 261 F. Supp. at 1004. Judge Posner did not mention the *Baxter* case in the *SmithKline Beecham* opinion.

<sup>103</sup> *Baxter*, 297 F.3d at 545. In *Baxter*, the parties were given an opportunity to amend their motion to seal to include a detailed, reasoned, document-by-document argument for confidentiality that included legal citations; the initial motion stated only that the parties had agreed on secrecy and that the documents contained commercially sensitive information. *Id.* at 545, 548.

also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing.”<sup>104</sup> It is not clear, though, how these considerations should be weighed when confidentiality is analyzed on the district court level in the Seventh Circuit. Other courts have also considered these factors when conducting a confidentiality analysis.<sup>105</sup>

According to the Seventh Circuit in *Jessup*, and to its progeny, settlement agreements filed with the court are subject to public access absent a compelling interest in confidentiality. Parties can avoid public access by avoiding judicial intervention and by following the proper procedure to keep their settlement confidential.<sup>106</sup> Parties’ reliance on confidentiality is not weighed.

### c. The Ninth Circuit

The United States Court of Appeals for the Ninth Circuit has rejected the idea that only certain types of information are appropriately kept confidential. In the recent product liability case *Phillips v. General Motors Corp.*,<sup>107</sup> a magistrate judge ordered the defendant car manufacturer to produce information about the total number and aggregate dollar amount of previous settlements involving fuel-fed fires and the type of pickup truck involved in the case. At the defendant’s request, the magistrate judge ordered the production pursuant to a protective order to which the parties had previously stipulated. The case later settled, after which the *Los Angeles Times* moved to intervene and requested that the court unseal the exhibit containing the aggregate settlement information. The district court permitted the unsealing, stating that the “narrow issue” before the court when it decided whether to uphold the protective order was whether “information a party seeks to keep quiet does not fall within the four corners of Rule 26(c).”<sup>108</sup> The district

<sup>104</sup> *Id.* at 546.

<sup>105</sup> For example, the federal Bankruptcy Code generally mandates that all documents filed in a bankruptcy case be available to the public, absent compelling circumstances. 11 U.S.C. § 107 (2000). A very recent bankruptcy opinion stated that, under this statute

[t]he criteria to be considered in determining whether confidentiality provisions in settlements justify keeping the substance of such settlements from public access must be flexible and vary according to the nature of the settlement and the specific extent and core-ness of the impact of the settlement on the bankruptcy case.

*In re Hemple*, 295 B.R. 200, 202 (Bankr. D. Vt. 2003) (citing *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (requiring “an exercise of judgment” in light of “[t]he importance of the material to the adjudication”)). The court included in the factors that should be considered “the necessity of the settlement to the viability of the bankruptcy case.” *Id.*

<sup>106</sup> Jenny B. Davis, *Case Opened: 7th Circuit Releases Sealed Settlement Agreement to Newspaper*, A.B.A. J. E-REP., Feb. 8, 2002, available at LEXIS, 1 ABA Journal eReport 5.

<sup>107</sup> 307 F.3d 1206, 1209 (9th Cir. 2002).

<sup>108</sup> FED. R. CIV. P. 26(c)(7). Rule 26(c)(7) grants a district court the power to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” by

court found that while the information covered under the stipulated protective order was "the kind of information Rule 26(c) recognizes as being legally protectable," the information at issue, aggregate settlement amounts and averages, was not of the type listed in the order. Additionally, the information did not deserve protection independently due to the parties' needs and interests.<sup>109</sup> The court thus implied that only certain types of information can be subject to a protective order.<sup>110</sup> On appeal, the Ninth Circuit corrected this interpretation of Rule 26, stating that the law gives district courts broad latitude to issue protective orders for all types of information, including – but not limited to – those types of information enumerated in Rule 26(c)(7), thus encompassing confidential settlement information.<sup>111</sup>

Nor did the Ninth Circuit focus on the physical act of filing to determine whether settlement information contained in discovery materials is subject to public access. Prior to settlement in *Phillips*, the original plaintiff, Phillips, filed a motion for discovery sanctions because GM additionally included unrequested computations with the material turned over under seal as ordered by the magistrate. Phillips attached a copy of the information about previous settlements to the motion for sanctions. The Ninth Circuit stated that such filing does not determine public accessibility:

Although we understand the public policy reasons behind a presumption of access to judicial documents (judicial accountability, education about the judicial process, etc.), it makes little sense to render the district court's protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court.<sup>112</sup>

The Ninth Circuit, however, expressly distinguished between documents attached to a non-dispositive motion and those made part of a dispositive motion such as a motion for summary judgment.<sup>113</sup> Thus, like the Seventh Circuit approach in *Baxter*, the

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making an order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." *Id.*

<sup>109</sup> *Phillips*, 307 F.3d at 1211-12.

<sup>110</sup> The Ninth Circuit identified these implications made by the district court. *Id.*

<sup>111</sup> *Id.* (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)).

<sup>112</sup> *Id.* at 1213.

<sup>113</sup> *Id.* (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (stating that once sealed discovery documents are made part of a dispositive motion, they "lose their status of being raw fruits of discovery" (internal quotations omitted))). In the very recent case *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135, the Ninth Circuit reiterated that the holding in *Phillips* was limited to materials filed with non-dispositive motions. The court explained this distinction:

Ninth Circuit does consider the influence of the documents on judicial decisions and the importance of the materials to the vitality and resolution of the claims to be important factors bearing on confidentiality, at least in the discovery context.<sup>114</sup>

Overall, the Ninth Circuit does not recognize either an exhaustive list of situations in which confidentiality may be appropriate or even a nonexclusive list of situations in which confidentiality is likely appropriate. The Ninth Circuit does not consider the physical act of filing to be determinative of access. The importance of a document to the resolution of the case may also be an important factor in confidentiality analysis.

#### *d. The Eleventh Circuit*

The United States Court of Appeals for the Eleventh Circuit has also indicated that, at least in the discovery context, filing does not automatically result in public access; however, the court applies this conclusion even when a document is used by the court to decide a dispositive motion. In *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*,<sup>115</sup> various members of the media sought to intervene after settlement of a defective tire case and requested the unsealing of discovery documents sealed pursuant to Rule 26. The defendant claimed that the documents contained trade secrets.<sup>116</sup> Regarding the act of filing discovery materials, the Eleventh Circuit stated: "[W]here a party has sought the protection of Rule 26, the fact that sealed material is subsequently submitted in connection with a substantive motion does not mean that the confidentiality imposed by Rule 26 is automatically forgone."<sup>117</sup>

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There are good reasons to distinguish between dispositive and non-dispositive motions. In *Seattle Times*, the Supreme Court noted that "of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." The same cannot be said for materials attached to a summary judgment motion because "summary judgment adjudicates substantive rights and serves as a substitute for trial."

*Id.* at 1135-36 (citations to *Seattle Times* and *Rushford* omitted). For discovery materials attached to a dispositive motion to be sealed, a party must show compelling reasons. *Id.*

<sup>114</sup> Additionally, a recent Ninth Circuit dissenting opinion cited the Seventh Circuit opinion in *Herrnreiter* for the rule, under Federal Rule of Civil Procedure 42, that "parties do not need an equitable decree from [a court] to accomplish the legitimate objective of dismissing this appeal after having worked out a satisfactory settlement privately." *N.W. Env't Advocates v. U.S. EPA*, No. 02-15826, 2003 U.S. App. LEXIS 16915, at \*2 (9th Cir. Sept. 12, 2002).

<sup>115</sup> 263 F.3d 1304 (11th Cir. 2001).

<sup>116</sup> *Id.* at 1307-08. Unlike in *Phillips*, the documents were not identified as containing settlement information. *Id.*

<sup>117</sup> *Id.* at 1313. This rule was recently restated by an Eleventh Circuit district court in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1365 (N.D. Ga. 2002) (citing *Chicago Tribune*: "[T]he mere filing of certain documents with a court does not render such material a matter of public record.").

Additionally, the Eleventh Circuit stated that the stipulation of the parties to a Rule 26 discovery protective order "replaces the need to litigate the claim to protection document by document, and postpones the necessary showing of 'good cause' . . . until the confidential designation is challenged."<sup>118</sup> Agreed-upon discovery documents are therefore presumptively confidential until challenged, but the court's final determination of confidentiality after a challenge is not determined by the wishes of the parties.<sup>119</sup> Absent challenge, however, the Eleventh Circuit seems to grant the parties power to determine what remains confidential and thus unavailable to the public.

The court did state, however, that "[i]n certain narrow circumstances, the common-law right of access demands heightened scrutiny of a court's decision to conceal records from the public and the media."<sup>120</sup> The court gave the example of a total sealing order, in which a court seals an entire case record and therefore gives the public the impression that the case never occurred.<sup>121</sup> Though the court quoted earlier cases in which a total seal was subject to heightened scrutiny,<sup>122</sup> it determined that the present case was dis-

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<sup>118</sup> *Chicago Tribune*, 263 F.3d at 1307-08.

<sup>119</sup> The district court in *Estate of Martin Luther King, Jr.*, stated that such presumptive confidentiality "greatly facilitates discovery by encouraging full disclosure in reliance on assurances of confidentiality." 184 F. Supp. 2d at 1362. However, parties "calling a document confidential does not make it so in the eyes of the court; these consensual protective orders merely delay the inevitable moment when the court will be called upon to determine whether Rule 26(c) protection is deserved, a decision ultimately rooted in whether the proponent demonstrates 'good cause.'" *Id.*

It is interesting to note that the district court in *Estate of Martin Luther King, Jr.* stated that courts should require parties who stipulate discovery protective orders to specify a date upon which the seal may be vacated, thus limiting the power to stipulate granted to parties in *Chicago Tribune*. *Id.* at 1361. The district court also stated that a judge serves as the primary representative of the public in the judicial process and thus should not "rubber stamp" stipulations to seal without considering the presumption of public access to public records. *Id.* at 1362-63 (quoting *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)).

The court additionally stated that the fact that confidential material was already briefly made available to the public due to an administrative error does not preclude a court mandate of further confidentiality. *Id.* at 1364.

<sup>120</sup> *Chicago Tribune*, 263 F.3d at 1311.

<sup>121</sup> *Id.*; see also *Estate of Martin Luther King, Jr.*, 184 F. Supp. 2d at 1365-66 ("Nevertheless, even where the common-law right of access attaches, only in extraordinary circumstances need the denial of such access be justified by a compelling interest," citing the *Chicago Tribune* example of a total sealing order). The First Circuit has also implied in dicta that blanket sealing orders require heightened consideration of the public interest in access; a blanket sealing order should be granted only after "adequate consideration of the public interest in such access, regardless whether the parties to the settlement agreement mutually supported the sealing order. . . . [W]e mention [the public interest issue] in order to flag the matter for consideration in future cases." *Picciotto v. Salem Suede, Inc. (In re Salem Suede, Inc.)*, 268 F.3d 42, 45 (1st Cir. 2001).

<sup>122</sup> *Chicago Tribune*, 263 F.3d at 1311 (quoting *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (citing *Brown v. Advanced Eng'g, Inc.*, 960 F.2d 1013, 1015-16 (11th Cir. 1982))).

tinguishable because the entire record was not sealed, and thus such scrutiny was not required.<sup>123</sup>

The Eleventh Circuit also implied in *Chicago Tribune* that the Rule 26(c)(7) list of situations in which discovery confidentiality may be appropriate based on a good cause showing is exhaustive: "Rule 26(c) permits a court upon motion of a party to make a protective order requiring 'that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.'"<sup>124</sup> The court stated that Rule 26 could apply in *Chicago Tribune* only if the documents at issue indeed met the criteria the court had previously determined were necessary for information to be considered a trade secret.<sup>125</sup> A concurring judge disagreed with the majority's restriction of Rule 26 to only an enumerated list of document types: "In light of the strong interest in having unimpeded discovery, third parties may be barred from accessing documents even when the documents are not protected by a privilege (like the trade secret privilege) . . . ."<sup>126</sup>

In summary, there is discrepancy across the jurisdictions regarding whether the act of filing a document, including a settlement agreement, with a court is determinative of whether the public has access to that document. Courts disagree as to the role played by the parties' desire for, and agreement to, confidentiality, and they disagree as to whether to consider a document's importance to the case and to judicial decisions. There is further discrepancy regarding how to treat sensitive cases that are not enumerated by Rule 26, and whether and how certain types of materials, such as those involving certain subject matter, are treated differently or held to a different standard in confidentiality analysis.

## II. PROBLEMS WITH THE CURRENT SYSTEMS

One criticism of sunshine reforms is that courts rarely exercise their discretion to prevent secret settlements.<sup>127</sup> Under sunshine laws, the ultimate decision to seal typically remains with the court; thus, the public does not necessarily have access to settlement information even when the public has an interest in the information. Research indeed indicates that judges in sunshine states do not aggressively prohibit confidentiality and that toxic

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1313 (quoting FED. R. CIV. P. 26(c)(7)).

<sup>125</sup> *Id.* at 1313-14.

<sup>126</sup> *Id.* at 1317 (Black, J., concurring).

<sup>127</sup> Fromm, *supra* note 3, at 683, 690.



tort cases continue to settle confidentially.<sup>128</sup> Moreover, sunshine laws simply do not apply to most cases, or even to all cases in which the public has an interest, as the list of cases in which the public has an interest is necessarily never comprehensive.<sup>129</sup> Even where a sunshine statute or rule applies, the provision might not apply to monetary settlement amounts (as in Texas).<sup>130</sup>

Additionally, sunshine reforms that require access based on enumerated subject matter may ignore the constitutional underpinnings of the right of access to judicial records. Even though a constitutional right of access may not be directly enforceable, access is arguably important for the informed discussion of the country's affairs and for the development of respect for, and understanding of, the legal system.<sup>131</sup> The public may be entitled to a right of access independent of the public's interest in given subject matter.

Alternatively, critics argue that sunshine reforms may require a litigant to divulge too much information, including information most people would agree should remain private. For example, a litigant's AIDS status may be considered health and safety information.<sup>132</sup> Critics such as Arthur Miller argue that judges may therefore compensate for litigants' loss of privacy by limiting discovery, thus undermining the purpose of liberal discovery rules.<sup>133</sup> These critics argue that a presumption of openness generally undervalues litigants' privacy by requiring consideration of the public interest with every request of confidentiality, thereby assuming that the public has an interest in all litigation.<sup>134</sup> Though such arguments directly address the discovery context, they can be made regarding settlement situations as well.

David Luban defends sunshine regimes against some of these privacy arguments by arguing that personal information such as AIDS status would not be considered health and safety information in which the general public has an interest. Additionally, a judge could treat such a case as an exception even if the information is thought to be of public importance.<sup>135</sup> Luban argues that there is

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<sup>128</sup> *Id.* at 690 (citing Dorothy J. Clarke, *Court Secrecy and the Food and Drug Administration: A Regulatory Alternative to Restricting Secrecy Orders in Product Liability Litigation Involving FDA-Regulated Products*, 49 FOOD & DRUG L.J. 109, 121 (1994)).

<sup>129</sup> *Id.* at 683.

<sup>130</sup> TEX. R. CIV. P. § 76a(2)(b) (Vernon Supp. 2002).

<sup>131</sup> Bechamps, *supra* note 6, at 127; Sobczak, *supra* note 7, at 415.

<sup>132</sup> Luban, *supra* note 5, at 2653-54 (identifying and refuting this argument).

<sup>133</sup> Miller, *supra* note 21, at 476-77; *see also* Luban, *supra* note 5, at 2653-54 (identifying and refuting Miller's argument).

<sup>134</sup> Miller, *supra* note 21, at 467; *see also* Epstein, *supra* note 23 ("Secret settlements allow both parties to get on with their lives by preserving privacy interests – say, the confidentiality of medical records – that, if anything, receive greater respect today than ever before.").

<sup>135</sup> Luban, *supra* note 5, at 2654.

no reason to believe that judges will limit discovery in response to sunshine reforms, especially because sunshine reforms change the presumption that discovery information is private, and thus the reforms should alter a judge's perception of what is public and private information.<sup>136</sup> Again, these defenses of sunshine regimes can be applied to the settlement context.

Other important factors, such as judicial economy, may similarly be neglected by sunshine regimes.<sup>137</sup> Miller argues that most cases are complex, technical, or merely involve the application of well-established principles of law to current fact patterns, and these types of cases do not generate any information in which the public has an interest.<sup>138</sup> He argues that sunshine reforms therefore impose an unnecessary burden on the courts.<sup>139</sup> Perhaps even worse, due to the technical and commercial nature of many cases, the reforms create an unnecessary risk of invasion of privacy or even the unconstitutional taking of information that is considered property. Approaches that allow public access to litigation materials may violate a litigant's right to the exclusive use of private property, such as research and development information or financial information.<sup>140</sup> Again, while Miller makes these arguments regarding discovery, settlement information could also potentially reveal these types of information, especially financial information.

Another major argument against sunshine reforms is that secret settlements may be the only way that a weak plaintiff can obtain compensation, and it is similarly argued that sunshine reforms will result in lower settlement amounts because plaintiffs will not be compensated for confidentiality. Without the possibility of secrecy, plaintiffs may not receive settlement offers and cases must go to trial, which is a costly process plaintiffs may not be able to afford.<sup>141</sup> Luban defends sunshine reforms by arguing that defendants will still have the standard incentives to settle, and even a non-confidential settlement may be less likely to lead to headlines than would a trial.<sup>142</sup> Judge Jack Weinstein, however, does acknowledge that rules limiting confidentiality may make it harder for plaintiffs to settle because such rules "inject a wild card into

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<sup>136</sup> *Id.* at 2655.

<sup>137</sup> Sobczak, *supra* note 7, at 415.

<sup>138</sup> Miller, *supra* note 21, at 467; *see also* Epstein, *supra* note 23 (arguing that some vehicles in the Firestone/Ford litigation were pushed beyond their performance limits in extreme conditions and that such misuse is often overlooked in liability cases).

<sup>139</sup> Miller, *supra* note 21, at 467.

<sup>140</sup> *Id.* at 467-74.

<sup>141</sup> Luban, *supra* note 5, at 2657 (identifying and refuting these arguments).

<sup>142</sup> *Id.*

the settlement game.”<sup>143</sup> Weinstein recognizes the risk that reducing confidentiality may discourage people, such as those in research and design, from expressing concerns in writing about things that implicate public health – thus possibly creating a larger danger to society.<sup>144</sup>

A criticism of the Third Circuit approach to settlement confidentiality, which consists of a strong presumption of public access based on the physical act of filing documents with a court, is that such a rule “makes virtually all complex settlements ‘public’ settlements because they will, by necessity, require some minimal level of court involvement.”<sup>145</sup> The practical concern of retaining jurisdiction for later enforcement requires filing of the settlement agreement; many settlements, like those that resolve class action cases, require judicial approval.<sup>146</sup> Privacy is not respected in such a system because privacy is in effect very difficult to obtain.

Another criticism of the Third Circuit approach is that it limits or grants access to court documents based on the label “judicial record” rather than on the information contained in the documents. Additionally, it is problematic that the trial court does not exercise discretion over documents and their subject matter until after the documents actually become public records, and ad hoc rules are then used to limit access retrospectively based on whether or not a document is labeled a judicial record.<sup>147</sup> Anne-Therese Bechamps argues that “[a] system that limits access to court documents not on the basis of the information they contain, but on the basis of the label they bear, is not conducive to the goals of confidence, understanding, and respect” for the legal system. An “ad hoc approach to defining the scope of the common law right belies the spirit of the right” and “projects an image of secrecy and distorted truth around what should be an open judicial system.”<sup>148</sup> However, Bechamps’ criticism was written before the *Pansy* decision. In *Pansy*, the Third Circuit defined balancing factors that a court may use to determine if judicial records should be sealed, including whether “a settlement agreement involves issues or parties of a public nature.”<sup>149</sup>

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<sup>143</sup> Weinstein, *supra* note 29, at 60-61; Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 516 (1994) (Weinstein’s *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL’Y 53, 59 (2000), *supra* note 29, is a more recent version of this 1994 piece.).

<sup>144</sup> Weinstein, *supra* note 29, at 60; Weinstein, *supra* note 143, at 516.

<sup>145</sup> FitzGerald, *supra* note 1, at 409.

<sup>146</sup> *Id.* FED R. CIV. P. 23(e) mandates that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.”

<sup>147</sup> Bechamps, *supra* note 6, at 124-25.

<sup>148</sup> *Id.*

<sup>149</sup> *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-88 (3d Cir. 1994).

The consideration of this factor may reduce the seemingly arbitrary nature of making confidentiality decisions based on the label of "judicial record" because it allows subject matter to be taken into account. However, the lack of predictability that such a balancing test may create may continue to perpetuate images of secrecy and distortion of the truth.

Such balancing since *Pansy* is still only conducted regarding documents that are filed with the court, though, so an argument may still exist that under the Third Circuit approach, parties and judges can avoid disclosing information that is obviously of public nature by not filing such information with the court, such as by filing a voluntary stipulation of dismissal without filing the actual settlement terms. It can be argued that such information should be released to the public regardless of whether a court is involved due to the public interest in certain types of information, such as that pertaining to public health and safety, as is recognized by some sunshine laws.<sup>150</sup>

Approaches that grant a trial judge the discretion to balance factors and then decide whether to limit or grant public access may result in inconsistent and unpredictable outcomes, which is a traditional argument against balancing tests and in favor of bright-line rules. First, judges may not be detached decision-makers regarding settlement confidentiality as they may have already formed attitudes about the parties and may have already encouraged or assisted in settlement. Thus, the judge would not be capable of adequately representing the public interest in access to the settlement information.<sup>151</sup>

Second, judges are often given nothing more than a general list of factors to balance, and thus they are not provided enough guidance regarding the balancing process to reach consistent results.<sup>152</sup> Additionally, by giving judges a number of factors and interests to consider, balancing approaches give judges a broad range of choices that may force the judges to make policy decisions that the legislature may be more competent to make.<sup>153</sup> Again, such a system permits inconsistent results. Similar problems occur with rules that give judges only an unspecified stan-

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<sup>150</sup> *E.g.*, TEX. R. CIV. P. § 76a(2)(b) (Vernon Supp. 2002) (including within court records "settlement agreements not filed of record . . . that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety").

<sup>151</sup> Bechamps, *supra* note 6, at 139.

<sup>152</sup> *Id.* at 143, 156.

<sup>153</sup> *Id.* at 143.

dard, such as "good cause," that a litigant must meet to gain access or to maintain secrecy.<sup>154</sup>

Even if a judge is able to discern what interests are involved in a case, a balancing test may force judges to balance incomparable interests.<sup>155</sup> The public interest in disclosure is balanced against an individual's right to privacy, and judges are given little guidance regarding how to weigh these seemingly distinct interests. Again, such a policy decision may be best left to the politically accountable legislature.<sup>156</sup>

A problem identified with the Seventh Circuit's approach to settlement confidentiality is that the options available to parties who want to keep their agreements confidential are limited. First, parties wanting confidentiality can file with the court and seek a confidentiality order. In *Jessup*, the Seventh Circuit identified reasons that parties may seek judicial involvement, such as later enforcement and the desire to have a "neutral third party . . . look over the settlement agreement and note any ambiguities or other flaws."<sup>157</sup> However, with any judicial involvement the settlement becomes a judicial record, and thus there is no guarantee that the information will remain under seal, even if a sealing is ordered as it was by the magistrate in *Jessup*.<sup>158</sup> Alternatively, to avoid any risk of public access, the parties can keep the settlement agreement private and pursue an action for breach if disclosure occurs. However, "changed circumstances may make continued confidentiality no longer in a party's interest, so there may be a perceived reason to disclose. If terms of an agreement are revealed and a breach action brought, proving damages can be a problem unless the agreement provides for liquidated damages."<sup>159</sup> Thus, parties wanting confidentiality do not face easy decisions.

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<sup>154</sup> See, e.g., D. MASS. LOCAL CT. R. 7.2(a) (West 2002) ("Whenever a party files a motion to impound, the motion shall contain a statement of the earliest date on which the impounding order may be lifted, or a statement, supported by good cause, that the material should be impounded until further order of the court.").

<sup>155</sup> Bechamps, *supra* note 6, at 143-44.

<sup>156</sup> *Id.* Such an argument assumes that a legislature can be sufficiently specific in making the policy judgment so that the decision can be applied by courts without the use of unrestrained judicial discretion.

<sup>157</sup> *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

<sup>158</sup> *Id.* at 927.

<sup>159</sup> *Law and Motion: Jessup v. Luther*, FED. LITIGATOR, Mar. 2002, at 61, available at WL 17 Fed. Litigator 61.

### III. PROPOSED SOLUTIONS

#### A. Ethical Rules

Richard Zitrin proposes an ethical rule as the solution to the secret settlement problem.<sup>160</sup> Zitrin argues that lawyers on both sides of a case actively participate in the cover-up of public information by creating secret agreements, and they justify the agreements as being required by "zealous advocacy."<sup>161</sup> Zitrin argues that court rules and legislation do not provide the best solution for several reasons. First, legislation is more difficult to draft than ethical rules.<sup>162</sup> Second, such top-down approaches are often based on insufficient information: Legislatures rarely have the best information about what is happening in the courts; appellate courts do not necessarily know what is happening in everyday litigation; and even trial courts only learn about secrecy when they are presented with stipulations and motions.<sup>163</sup> Zitrin claims that legislation and court rules necessarily contain appropriate exceptions, and a lawyer's historical duty to his or her client – as well as state ethics rules reinforcing the primacy of that duty – will cause lawyers to argue that any present case is an exception. As judges face crowded dockets, a lawyer arguing that a case does not fall under the public law has an excellent chance of winning the argument.<sup>164</sup>

Zitrin proposes a standard of disclosure that does not limit confidentiality at all, but rather ensures that lawyers cannot contract away their ability to disclose known dangers to the public.<sup>165</sup> With an ethical rule, "[i]nstead of lawyers feeling, as they do under the current rules, the chilling effect on their duties to the client should they refuse to secretize information, they will feel the chilling effect of the prohibition against putting the public in danger where the damages to the client are minimal."<sup>166</sup> Zitrin's most recent proposal reads:

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<sup>160</sup> Zitrin, *supra* note 13, at 1. Zitrin proposed a model rule of professional conduct at the Hofstra University School of Law Conference on Legal Ethics: Access to Justice (Spring 1998), and his rules have been twice considered and rejected by the ABA Committee on Evaluation of the Rules of Professional Conduct. *Id.* at 1, 18, 19. For more detail, see Richard Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 115 (1999).

<sup>161</sup> Zitrin, *supra* note 13, at 19.

<sup>162</sup> *Id.* at 20.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 19.

<sup>166</sup> *Id.* at 20.

A lawyer shall not participate in offering or making an agreement among parties to a dispute, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that [the lawyer reasonably believes] [a reasonable lawyer would believe] directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual[s].<sup>167</sup>

Zitrin compares such a rule to those that limit client confidentiality, which have been adopted in most states, such as rules allowing disclosure where a client intends to commit a crime likely to result in death or great bodily injury.<sup>168</sup> Such rules tip the balance in favor of a lawyer's ability to protect society as opposed to a lawyer's duty to protect client confidences.

In addition to clarifying the standards and procedures courts should use when sealing records, Anne-Therese Bechamps also wants to "redefine the lawyer-client relationship" through rules of professional conduct.<sup>169</sup> Bechamps argues that an attorney's right under the ABA Model Rules of Professional Conduct to withdraw from representing a client if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent, or if withdrawal can be accomplished without material adverse effect on the interests of the client" is inadequate because a sealing order may not rise to this high standard.<sup>170</sup> She asserts that an effective remedy would be "to create and protect a sphere of moral autonomy in which lawyers would 'align themselves more with the courts and their peers and less with their clients.'"<sup>171</sup> She states that a more immediate solution, however, would be for lawyers and clients to engage in a dialogue regarding community values such as fairness, especially in cases that involve public interest. Lawyers and clients should discuss the ethical implications of confidentiality and explore solutions that do not adversely impact the public.<sup>172</sup> Judge Jack Weinstein likewise believes that attorney

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<sup>167</sup> *Id.* app. A (brackets in original) (Proposed Model Rule 3.2(B), presented to ABA Committee on Evaluation of the Rules of Professional Conduct, Feb. 2001).

<sup>168</sup> *Id.* at 19.

<sup>169</sup> Bechamps, *supra* note 6, at 155.

<sup>170</sup> *Id.* (citing ABA MODEL RULE OF PROF'L CONDUCT 1.16(b)(3) (1987), current version at ABA MODEL RULE OF PROF'L CONDUCT 1.16(b)(4) (2002)).

<sup>171</sup> Bechamps, *supra* note 6, at 155-56 (quoting Frederick A. Elliston, *Ethics, Professionalism and the Practice of Law*, 16 LOY. U. CHI. L.J. 529, 546 (1985)).

<sup>172</sup> Bechamps, *supra* note 6, at 156-57; see also Frances Komoroske, *Should You Keep Settlements Secret? Not If You Can Help It*, TRIAL, June 1999, at 55, 56-57 (publication of the Association of Trial Lawyers of America) ("It is important that this issue [of secrecy] be discussed with the client going into the case. The client should be educated about the benefits to the public, including plaintiff's family and friends, of not signing a confidentiality agreement.").

ethical obligations to inform the public are at least a partial solution.<sup>173</sup>

### *B. Balancing Tests*

Laurie Dore proposes that courts use a balancing test to determine when consensual secrecy should be upheld, and the factors to be balanced and the weights to be given depend on the stage of litigation at which confidentiality is requested.<sup>174</sup> Dore defines a distinct mix of balancing factors for three different confidentiality contexts: stipulated protective orders regarding discovery, the sealing of judicial records, and confidential settlements.<sup>175</sup> Her approach focuses on whether particular access achieves the underlying objectives of public access – to facilitate public monitoring of the judicial system, to enhance public confidence in the system, to educate the public, and to ensure fair and accurate fact-finding.<sup>176</sup>

In regard to the sealing of settlement terms, Dore argues that litigants do not file terms of settlement with the court unless they want the court to take later action; thus, filed settlements relate to judicial decision making and should be subject to a presumption of access.<sup>177</sup> That presumption is weak, however, because settlements do not present the court with an issue of substantive rights; as a result, party reliance upon the sealing order and the importance of confidentiality in achieving the settlement may overcome the presumption of access.<sup>178</sup> Ultimately, the public and private interests implicated by the settlement must be balanced, and judicial discretion is necessary.<sup>179</sup> For example, the public has a particular interest in the use of government funds and in settlements that involve and bind a government entity.<sup>180</sup>

The public, however, generally should not have an interest in settlements between private parties. Even though settlement information may help other parties assess the merits of their arguments, it does not directly advance the adjudication of other cases.<sup>181</sup> Dore argues that in most private cases, public policy favoring resolution can justify settlement confidentiality, unless an unusual or compelling need for public access is present.<sup>182</sup> Thus, a

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<sup>173</sup> Weinstein, *supra* note 29, at 60; Weinstein, *supra* note 143, at 514.

<sup>174</sup> Dore, *supra* note 4, at 286.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 402.

<sup>177</sup> *Id.* at 394.

<sup>178</sup> *Id.* at 395.

<sup>179</sup> *Id.* at 395, 402.

<sup>180</sup> *Id.* at 397-98.

<sup>181</sup> *Id.* at 398.

<sup>182</sup> *Id.* at 399.



court has little authority to make a private settlement public if the litigants stipulate dismissal.<sup>183</sup> Overall, Dore's test favors the allowance of confidentiality in settlements. Dore only addresses settlements filed with a court.

Brian FitzGerald argues that the balancing test used to determine settlement confidentiality should use the same standards that should be used with total sealing orders, though he does not define what factors should be balanced.<sup>184</sup> FitzGerald argues that the existing tests used with the sealing of pretrial discovery materials should not be applied to the total sealing and settlement contexts because the latter two situations involve a judicial act at the adjudicative stage.<sup>185</sup> Because the public enjoys a strong common law presumption in favor of access to judicial proceedings, as well as some level of a First Amendment right of access, total sealing orders must overcome that strong presumption.<sup>186</sup> FitzGerald argues that sealing settlement agreements that have been filed with the court raises similar concerns.<sup>187</sup>

FitzGerald claims that courts have indeed recognized that the public has a stronger right of access regarding public documents than with discovery, and have thus applied variations of a "good cause plus" standard to total sealing orders. In the absence of Supreme Court guidance, courts have added an unarticulated "plus" or extra showing to the "good cause" standard used with discovery documents in *Seattle Times*; however, the "plus" necessary for sealing remains unclear.<sup>188</sup> FitzGerald argues that the discovery "good cause" standard should not be used, but that a new and significantly heightened balancing test for the total sealing and settlement contexts should be created by reweighing the factors used in "good cause" determination. FitzGerald states that no one bright-line rule will suffice for courts to determine when sealing is appropriate and necessary.<sup>189</sup> However, he declines to enumerate

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<sup>183</sup> *Id.* at 401.

<sup>184</sup> FitzGerald, *supra* note 1, at 410.

<sup>185</sup> *Id.* at 394. The idea that a different and more heightened standard should be used with total sealing orders is supported by the Eleventh Circuit in *Chi. Tribune Co. v. Bridge-stone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001); the First Circuit in *Picciotto v. Salem Suede, Inc. (In re Salem Suede, Inc.)*, 268 F.3d 42, 45 (1st Cir. 2001); and the Northern District of Georgia in *Estate of Martin Luther King, Jr. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1366-67 (N.D. Ga. 2002); see *supra* notes 121-23.

<sup>186</sup> FitzGerald, *supra* note 1, at 392, 395.

<sup>187</sup> *Id.* at 405.

<sup>188</sup> *Id.* at 392, 393 n.58 (citing *Joy v. North*, 692 F.2d 880, 883 (2d Cir. 1982) (requiring an "exercise of judgment" in addition to good cause when sealing materials from the adjudication stage), *cert. denied*, 460 U.S. 1051 (1983); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (requiring the party seeking the hearing to show that the material is the "kind of information that courts will protect").

<sup>189</sup> FitzGerald, *supra* note 1, at 411.

the factors that should be balanced, acknowledging that "[t]he development of a standard for granting secrecy will not be easy" and stating only that the new balancing test must "address[] the unique common law and First Amendment concerns raised by the sealing of public records."<sup>190</sup> FitzGerald, like Dore, only addresses settlements that have been filed with the court.

Sharon Sobczak asserts that a balancing test should be applied to the total sealing order context, and she does define what factors a judge should consider.<sup>191</sup> If one adopts FitzGerald's argument that total sealing orders and confidential settlements should be treated similarly, Sobczak's factors may similarly be applied to confidential settlements filed with the court. Unlike Dore's test, Sobczak's test generally favors public access. Sobczak defines five elements, the first of which is the nature and magnitude of the harm to the parties that will result if confidentiality is not allowed.<sup>192</sup> More weight should be given to possible money damage than to damage to one's reputation.<sup>193</sup> Litigants should have to show, with some evidentiary support, high probability that the harm will occur, and the court should attempt to find analogous cases to determine if the occurrence of harm is indeed likely.<sup>194</sup> The judge should also consider the type of case and the parties involved. For example, public officials should be protected against mere curiosity about matters that have no relation to their public lives.<sup>195</sup> Second, the court should support confidentiality only when it is certain that there is no less restrictive way of protecting the parties' interests, such as the sealing of only certain documents or the use of initials or pseudonyms.<sup>196</sup>

On the side of the balance favoring access, the court should consider the public's interest in having the record remain open.<sup>197</sup> The public should have a strong presumption of access to public records, especially those involving judicial action, and the parties

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<sup>190</sup> *Id.* at 411-12.

<sup>191</sup> Sobczak, *supra* note 7, at 415-16.

<sup>192</sup> *Id.* at 416.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 416-17.

<sup>195</sup> *Id.* at 416. However, in defamation cases, the Supreme Court has suggested that a wide range of issues are relevant to the assessment of an official's fitness for office. *E.g.*, *Oscala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971) (holding that plaintiff, as the city mayor and as candidate for county tax assessor, was a public official and that a charge that he had been indicted for perjury in a civil rights suit was relevant because "a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office'").

<sup>196</sup> Sobczak, *supra* note 7, at 417. For a recent analysis of the use of litigant anonymity, see Babak Rastgoufard, Note, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009 (2003).

<sup>197</sup> Sobczak, *supra* note 7, at 417.

seeking sealing should bear a heavy burden of showing harm before sealing is even considered.<sup>198</sup> While the public does not generally have more than a general interest when only pleadings have been filed, public interest should be given more weight when the pleadings contain information that may contain public health or safety information.<sup>199</sup> The judge has the ultimate role of deciding whether documents will be useful to future litigants and thus what the public interest is.<sup>200</sup>

Another factor judges should consider is whether the public has alternative means of obtaining the information at issue, such as through an administrative agency – a factor that is especially important when a judge has doubts about whether public interest in the information even exists.<sup>201</sup> The final factor that should be considered is the stage of the proceeding.<sup>202</sup> The further into the proceeding, the more judicial action has occurred and the more time has been spent and expense incurred; as such, the presumption in favor of public access should be stronger.<sup>203</sup> Overall, Sobczak's test makes it difficult for parties to achieve confidentiality.

Judge Jack Weinstein too believes that a balancing test is necessary to determine the appropriateness of secrecy, and he argues that judicial discretion is necessary in the application of that test.<sup>204</sup> He lists generally the factors that should be balanced: "the interests of the parties in keeping the information confidential against the interests of the public in publishing it . . . the interests of litigants in other suits, the needs of regulatory agencies to have access to information, concerns of public interest groups, and the interests of future plaintiffs."<sup>205</sup> In cases concerning sociopolitical problems and in mass tort cases, public interest is especially strong.<sup>206</sup> Weinstein argues that, in general, secrecy should be rejected whenever there is doubt as to whether it is appropriate.<sup>207</sup>

### C. *Bright-Line Approaches*

Anne-Therese Bechamps argues that a bright-line approach is preferable over a balancing approach to secret settlements for several reasons: balancing tests require judges to make policy judg-

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 418.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Weinstein, *supra* note 29, at 61; Weinstein, *supra* note 143, at 516.

<sup>205</sup> Weinstein, *supra* note 29, at 58; Weinstein, *supra* note 143, at 513.

<sup>206</sup> Weinstein, *supra* note 29, at 57-58; Weinstein, *supra* note 143, at 511-13.

<sup>207</sup> Weinstein, *supra* note 29, at 65.

ments better left to the legislature;<sup>208</sup> by giving judges a choice of many outcomes, balancing tests leave room for inconsistent outcomes and therefore reduce confidence in the legal system;<sup>209</sup> and balancing tests may force a judge to weigh incomparable interests, such as privacy and access to public records.<sup>210</sup> She advocates the application of a bright-line common law right of access to settlements filed with the court, with some exceptions based on subject matter.<sup>211</sup>

Bechamps suggests a model statute that identifies six situations in which individual privacy rights may outweigh the public's common law right of access:

- (1) All documents filed with the court are public records and available for inspection unless access is limited by statute or by court order entered according to the procedures set forth below.
- (2) Upon the entry of a final judgment or consent decree, any party to a civil action may move to seal specific documents or portions thereof contained in the court records.
- (3) Before limiting access to court records, the court shall give notice to all parties and interested third parties and shall hold a hearing on the motion. The court shall not seal court records except upon finding that the moving party has proved by clear and convincing evidence that information contained in the document sought to be sealed:
  - (a) constitutes a trade secret or other confidential commercial research or information;
  - (b) is a matter of national security;
  - (c) promotes scandal or defamation;
  - (d) pertains to wholly private family matters, such as divorce, child custody, or adoption;
  - (e) poses a serious threat of harassment, exploitation, physical intrusion, or other particularized harm to the parties to the action; or
  - (f) poses the potential for harm to third persons not parties to the litigation.

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<sup>208</sup> Bechamps, *supra* note 6, at 143-44.

<sup>209</sup> *Id.* at 124.

<sup>210</sup> *Id.* at 143-44.

<sup>211</sup> *Id.* at 118-19, 124.

- (4) The sealing order shall specify the documents to be sealed, the reasons for sealing, and the duration of the order.<sup>212</sup>

Bechamps states that the situations involving trade secrets and commercial information, national security, and scandal or defamation, are well-recognized exceptions to the common law right of access.<sup>213</sup> She states that the threat of harassment or other particularized harm "protects privacy when the public has little interest in the controversy and is supported by the constitutional right to privacy that the Supreme Court has recognized in certain family matters."<sup>214</sup> She states that the exceptions also allow the court to protect parties from theft, exploitation, and other intrusion, especially in cases in which the settlement amount is large.<sup>215</sup> The final exception, involving harm to third parties, protects third parties who have not availed themselves of the adjudication process, but who may become subjects of scrutiny as a result of public access to settlement information, such as in a situation where bank records are revealed.<sup>216</sup> Bechamps's overall approach is to make cases available to the public "to the extent that parties take advantage of court processes to resolve their dispute," as the public is entitled to know how court resources are utilized.<sup>217</sup>

The U.S. District Court for the District of South Carolina recently became the first federal district in the nation to adopt a bright-line rule making any settlement filed with the court a public record.<sup>218</sup> Local Civil Rule 5.03 outlines the procedure a litigant must follow to submit a motion to seal documents, and it contains a provision under which public notice must be provided by the clerk of the court.<sup>219</sup> Newly adopted subsection C reads: "No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule."<sup>220</sup> Parties can still achieve confidential settlements by not filing their agreements with the court.<sup>221</sup> Local

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<sup>212</sup> *Id.* at 144-46.

<sup>213</sup> *Id.* at 145-46.

<sup>214</sup> *Id.* at 146 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

<sup>215</sup> Bechamps, *supra* note 6, at 146.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 156.

<sup>218</sup> *South Carolina Federal Judges Adopt Rule Banning Secret Settlements*, PROD. LIAB. ADVISOR, Nov. 2002, at 7, available at WL 165 PLADVISORY 7; *South Carolina: Federal Judges Ban Confidential Settlements*, SUN-SENTINEL (Fort Lauderdale), Nov. 8, 2002, at 3A.

<sup>219</sup> D.S.C. LOCAL CIV. R. 5.03(A)-(B) (Law. Co-op Supp. 2002).

<sup>220</sup> D.S.C. LOCAL CIV. R. 5.03(C) (Law. Co-op Supp. 2002) (effective Nov. 1, 2002), available at <http://www.scd.uscourts.gov/Notices/LR503.pdf>.

<sup>221</sup> Local Civil Rule 5.03 states: "Nothing in this Rule limits the ability of the parties, by

rules may retain a provision allowing settlements to be kept secret by judicial discretion if there is no public interest in the case,<sup>222</sup> though it has also been reported that no exception exists for the settlement of cases that reveal sensitive information.<sup>223</sup>

Richard Epstein argues against the South Carolina rule, claiming that "the major problem today is not too many secret settlements but too much litigation – and public settlements may only reinforce the underlying unsoundness of the tort system."<sup>224</sup> When information obtained by one plaintiff is available to others, the cost of litigation is reduced and more suits may result, and plaintiffs may be encouraged to file suits against defendants who settle once.<sup>225</sup> When plaintiffs target a defendant, such as a medical facility, insurance rates for other facilities will increase, which may prevent important public services and new (and potentially safer) products from being provided or developed.<sup>226</sup> Additionally, settlement disclosure may increase the time it takes plaintiffs to receive their money because defendants are likely to try to postpone settlement in an effort to prevent public access to case information.<sup>227</sup> Overall, Epstein argues that the South Carolina amendment is too drastic because public disclosure does not necessarily serve the public interest, and he argues that "marginal and conscientious adjustments in existing practice" should instead be made.<sup>228</sup> He does not propose any specific changes. Others who oppose the rule have listed situations in which privacy should be permitted, including malpractice cases in which the plaintiffs want to keep their medical conditions private, molestation or sexual har-

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agreement, to restrict access to documents which are not filed with the Court." It is estimated that 75% of all civil cases in South Carolina are settled out of court. *S.C. Seeks to Ban Secret Settlements*, N.Y. TIMES, Sept. 21, 2002, at 1A [hereinafter *S.C. Seeks to Ban*].

<sup>222</sup> *South Carolina Federal District Court Proposes to Cease Sealing Settlements*, 71 U.S. L. WK. 2085, 2085 (2002) (quoting Chief Judge Joseph F. Anderson, Jr.). Local Civil Rule 1.02 provides that any local rule can be overridden by the court for good cause in a particular case. D.S.C. LOCAL CIV. R. 1.02 (Law. Co-op Supp. 2002). The South Carolina Defense Trial Attorneys Association argues that if the court retains discretion to overrule subsection C in any case, then the subsection is unnecessary and without effect. *Comment to Proposed Amendment to Local Rule 5.03*, S.C. DEF. TRIAL ATT'YS ASS'N, Sept. 10, 2002, at <http://www.lfcj.com/articles/display.asp?artnum=79> [hereinafter *Comment to Proposed Amendment*].

<sup>223</sup> *South Carolina: Federal Judges Ban Confidential Settlements*, *supra* note 218 (citing a wire report source); *S.C. Seeks to Ban*, *supra* note 221 (citing the Associated Press).

<sup>224</sup> Epstein, *supra* note 23; see also *South Carolina: Federal Judges Ban Confidential Settlements*, *supra* note 218; *Comment to Proposed Amendment*, *supra* note 221 ("[T]he proposed amendment to Local Rule 5.03 will not address the perceived problems arising from the use of confidential settlement agreements, but instead, may ultimately foster litigation by virtue of potential Plaintiffs being encouraged by reports of 'big money settlements.'").

<sup>225</sup> Epstein, *supra* note 23.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

assessment cases in which the plaintiffs want to keep their identity private, and certain cases involving trade secrets or proprietary information.<sup>229</sup>

Supporters of the new South Carolina rule believe that it will cause public hazards, such as faulty products, to be discovered more quickly.<sup>230</sup> South Carolina Chief Justice Jean Toal does not believe that the rule will burden the courts with more cases. Based on her discussions with chief justices of other jurisdictions with open settlement rules, Toal says that those jurisdictions do not have backlog problems due to such rules and that "it just complicates things to have [secrecy] taken off the table as a negotiating tactic."<sup>231</sup>

In California, a bright-line approach to secret settlements was considered by the state legislature in 2001,<sup>232</sup> but it failed to pass.<sup>233</sup> Like sunshine reforms, the proposed legislation enumerated types of cases that cannot be settled confidentially, regardless of whether the agreement is filed with the court. Assembly Bill 36 and Senate Bill 11, which were identical, covered any lawsuit

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<sup>229</sup> *S.C. Seeks to Ban*, *supra* note 221 (quoting Dr. R. Duren Johnson, Jr., president of the South Carolina Medical Association and Mills Gallivan, president of South Carolina Defense Trial Attorneys' Association); *Comment to Proposed Amendment*, *supra* note 222.

<sup>230</sup> *S.C. Seeks to Ban*, *supra* note 221; Rebecca E. Epstein, *Comment on August 1, 2002 Proposed Local Rule 5.03 Amendment*, TRIAL LAW. FOR PUB. JUST., Sept. 19, 2002, available at [http://www.tlpj.org/briefs/comments\\_secrecy\\_091902.htm](http://www.tlpj.org/briefs/comments_secrecy_091902.htm).

<sup>231</sup> *S.C. Takes Lead in Opening Lawsuit Settlements to the Public View*, THE FREEDOM FORUM, FIRST AMENDMENT, Sept. 23, 2002 (citing the Associated Press), at <http://www.freedomforum.org/templates/document.asp?documentID=17000>.

South Carolina's state courts were expected to follow the federal district's lead. *South Carolina: Federal Judges Ban Confidential Settlements*, *supra* note 218 (citing South Carolina Chief Justice [Jean Toal]); *60 Minutes II*, *supra* note 16 (Internet coverage of the Jan. 15, 2003, lead story on 60 Minutes II with Dan Rather, citing Chief Justice Toal). Indeed, proposed South Carolina Rule of Civil Procedure 38 stated that "[n]o settlement agreement filed with the court shall be sealed pursuant to this Rule." Proposed S.C. R. CIV. P. 38 (proposed 2003), available at <http://www.judicial.state.sc.us/whatsnew/Rule%2038%20SCRCP.htm> (last visited Oct. 2, 2003). However, Rule 38 received significant criticism, especially from representatives of doctors and insurance companies, who anticipated that increased settlement and insurance costs would be passed on to consumers. Jeffrey Collins, *High Court to Discuss Secret Settlement Ban*, AUGUSTA CHRON., (Jan. 22, 2003), online edition, at [http://www.augustachronicle.com/stories/012203/met\\_124-1025.shtml](http://www.augustachronicle.com/stories/012203/met_124-1025.shtml) (citing the Associated Press). Instead, Rule 41.1 was enacted, which does not prohibit courts from approving secret settlements, but rather requires a court to balance enumerated factors before deciding to seal an approved settlement. S.C. R. CIV. P. 41.1(c) (effective May 5, 2003), available at 2003 S.C. LEXIS 108. These factors are: the public or professional significance of the lawsuit; the perceived harm to the parties from disclosure; the alternatives available to protect the interests of the parties; and the impact of sealing on the public interest, including health and safety. In family law cases, the court is required to additionally consider the presence of private financial information and sensitive custody issues. *Id.* Rule 41.1 does prohibit courts from approving confidential settlements that "involve a public body or institution." *Id.*

<sup>232</sup> A.B. 36, 2001-02 Reg. Sess. (Cal. 2001); S.B. 11, 2001-02 Reg. Sess. (Cal. 2001).

<sup>233</sup> Nancy Vogel, *Foes Jab at Davis over Bill Signings, Died in the Legislature*, L.A. TIMES, Oct. 16, 2001, at B1.

based upon harm allegedly "caused by a defective product, financial fraud, unfair insurance claims practice, or environmental hazard."<sup>234</sup> The bills stated that information contained in settlement agreements or acquired through discovery "concerning" the enumerated subjects "shall be presumed to be public information and may not be kept confidential pursuant to an agreement of the parties."<sup>235</sup> Agreements that restrict a party from disclosing such information would be void and unenforceable.<sup>236</sup> A provision of the legislation would have allowed trade secrets to remain confidential.<sup>237</sup> The bills followed and expanded upon the 2000 adoption of California Rule of Court 243.1, which makes all trial court records, including settlements filed with a court, presumably open unless there is an "overriding interest that overcomes the right of public access to the record."<sup>238</sup>

Opponents of the California legislation argued that the proposed blanket legislation ignored the need to balance the public interest in the search for truth with litigants' privacy interests.<sup>239</sup> Opponents also argued that because what is considered a "trade secret" can be narrowly construed, the legislation would put businesses in the state at risk of disclosure of intellectual and informational property and competitive information.<sup>240</sup> They also claimed that confidential settlements do not hide problems because allegations about a business's misdeeds are already in the public record, and because many plaintiffs' attorneys conduct press conferences when claims are made. Since confidential settlements are made for reasons other than culpability, settlement information does not provide any additional evidence of actual public hazards.<sup>241</sup>

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<sup>234</sup> A.B. 36 § 2 (proposed CODE CIV. P. § 188(a)); S.B. 11 § 2 (proposed CODE CIV. P. § 188(a)).

<sup>235</sup> A.B. 36 § 2 (proposed CODE CIV. P. § 188(b)); S.B. 11 § 2 (proposed CODE CIV. P. § 188(b)).

<sup>236</sup> A.B. 36 § 2 (proposed CODE CIV. P. § 188(c)); S.B. 11 § 2 (proposed CODE CIV. P. § 188(c)).

<sup>237</sup> A.B. 36 § 2 (proposed CODE CIV. P. § 188(b)(1)); S.B. 11 § 2 (proposed CODE CIV. P. § 188(b)(1)).

<sup>238</sup> CAL. R. CT. 243.1 (West Supp. 2003) (adopted Oct. 27, 2000). Additionally, the Rule requires that "[t]he overriding interest supports sealing the record"; "[a] substantial probability exists that the overriding interest will be prejudiced if the record is not sealed"; "[t]he proposed sealing is narrowly tailored"; and "[n]o less restrictive means exist to achieve the overriding interest." *Id.*

<sup>239</sup> David H. Martin, *Protecting the Integrity of Discovery*, L.A. LAW., Mar. 24, 2001, at 92.

<sup>240</sup> Michael K. Brown & Lisa M. Baird, *Businesses' Privacy and Property Rights Threatened in California*, ANDREWS TIRE DEFECT LITIG. REP., April 2001, at 11.

<sup>241</sup> *Id.*

It is interesting to note that a recent anti-secrecy bill signed into law in California takes a more moderate approach than the defeated bills, allowing a court to take potential prejudice to parties into account. Assembly Bill 634, signed into law on August 28, 2003, prohibits a court



#### IV. A MORE APPROPRIATE SOLUTION

In analyzing confidentiality, settlements should not be subjected to the same "good cause" standard and balancing test as are discovery documents because of the public's different levels of interest in different stages of a proceeding. The public's level of interest and resulting amount of access should increase as a proceeding advances due to the different levels of access allowed historically and to the increasing level of judicial involvement and use of resources that has occurred by later stages. The test that should be applied to settlements does need to be clearly articulated. In general, a middle ground should be found among the solutions already suggested to the secret settlement problem.

##### A. Which Settlements Should Be Covered

The first question that must be answered in formulating a solution to the settlement secrecy problem is which settlements a new rule should cover.<sup>242</sup> Jurisdictions like the Third Circuit and the Seventh Circuit focus on the filing of documents to determine what classifies as a judicial record and thus to what the public should have access. Some jurisdictions with sunshine-type reforms do not confine their treatment of secret settlements to judicial records, but instead enumerate subject matter that is covered by a rule regardless of whether it is filed with a court.

A settlement is generally a private agreement between parties, and in order to preserve the historical right to contract freely, courts and legislatures should be reluctant to intrude upon a settlement unless a party asks that a court somehow be involved.<sup>243</sup> Parties should generally be permitted to receive or give consideration in exchange for silence if they so choose.

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from recognizing or enforcing confidential agreements regarding violations of California's elder abuse law absent a showing that the information is otherwise privileged, the information is not evidence of the abuse of an elder, or there is "a substantial probability that prejudice will result from the disclosure and that the party's interest in the information cannot be adequately protected through redaction." A.B. 634 § 1, 2003-04 Reg. Sess. (Cal. 2003) (proposed CODE CIV. P. § 2031.1).

<sup>242</sup> "Rule" is used loosely here to refer to a court rule, piece of legislation, and/or other means of addressing which settlements should be publicly accessible.

<sup>243</sup> Regarding this historical right to contract, Harry Jones stressed:

[T]he deeply ingrained power that the idea of contract has had, throughout recorded history, on the minds of men and women; the centrality of contract as a basic institution of contemporary society; and the significance of freedom of contract as one of the great 'constitutional' devices for the dispersion of power in a society fearful, as ours has always and rightly been, of the concentration of too much power in too few hands.

Harry W. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 44 (1975).

If a rule-making body does want to make settlements in which a court has no involvement publicly accessible, a bright-line component to a settlement solution is always necessary because, if no court is involved in a settlement situation at any point, there is no appropriate governmental or other oversight body to analyze whether public access is appropriate based on the facts of the situation. A bright-line rule that prohibits all settlements or generalized settlements based on enumerated traits, such as those containing certain subject matter, from being confidential is necessary.<sup>244</sup>

The problem with applying bright-line rules to cases in which a court is not involved is that those rules fail to recognize that every factual situation is different, even across cases containing similar subject matter. Thus, before it is required that the public have access to settlement information, the settlement should be analyzed by a competent body that has the discretion to disallow access if it is inappropriate. For example, even a plaintiff in a seemingly "standard" product liability case that does not contain sensitive health information may have legitimate reasons for shielding a settlement from the public. As a perhaps extreme example, a plaintiff may need to avoid a disturbed or even dangerous former acquaintance. Settlement information may reveal specifically or generally where the plaintiff lives through the listing of the plaintiff's address or even because the settlement is with a localized business; the public disclosure of such information may be enough to put her in danger. Such a plaintiff could not settle with a manufacturer and maintain privacy if products liability cases result in a type of settlement that must be made public according to a bright-line rule.

Additionally, in order to provide much public protection, such bright-line rules that cover enumerated settlements in which a court is not involved can only define the covered settlements generally and broadly; there is no authority to assess what "gray" cases are covered within the enumerated categories. If a narrow definition of covered settlements is used in a bright-line rule, settlements that truly contain information important to the public likely will not fall under the definition and therefore will not be disclosed, rendering the confidentiality rule ineffective. However, broad definitions, such as general subject areas, conversely cause cases that are not important to the public to be revealed. Parties are then prevented from negotiating a confidentiality provision that they should rightly be able to utilize, and litigants' privacy is vio-

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<sup>244</sup> *E.g.*, FLA. STAT. ANN. § 69.081 (West Supp. 2003).

lated without satisfying a public interest as contemplated by the rule-maker.

Therefore, due to the necessity of using problematic bright-line rules to encompass cases in which a court is not involved, court involvement should be necessary before settlement information is required to be available to the public. The court would then be able to exercise its discretion to prevent access where it is inappropriate, so as not to unnecessarily infringe upon the litigants' right to contract.

The next concern is how or to what extent a court must be involved in a settlement before the court is permitted to determine that public access is necessary. In formulating a solution to the settlement secrecy problem, it must be decided whether the required judicial inquiry into access should apply only to settlements with terms that are actually on file with the court. Under the status quo, a court will sometimes address or approve a settlement generally without having the specific terms filed. Additionally, most jurisdictions, such as the Seventh Circuit, allow parties in a case to avoid public disclosure of a settlement by filing a stipulated dismissal without filing the terms of the settlement with the court, even where the court is aware of the settlement.<sup>245</sup> Some jurisdictions, such as the Seventh Circuit and the Ninth Circuit, consider the materiality of documents to the claims brought and the extent to which the court has relied on settlement information to make substantive judicial decisions when deciding whether information filed with the court is public record, such as by distinguishing between the court's use of settlement information to make a dispositive or non-dispositive decision.<sup>246</sup>

Once a court uses resources by addressing a settlement, the public should have a right of access to information about that settlement, including its terms. Whether or not a judge used the settlement to make substantive or dispositive decisions should have no bearing on this rule as judicial resources are used any time a court considers a settlement. Additionally, determining whether a settlement influenced certain court decisions and how to categorize those decisions would be difficult and would require further resources. Thus, a secret settlement rule should apply not only to settlements with terms filed voluntarily by the parties, but also to settlements that a court addresses or references for any reason. Procedural rules should mandate that the court can address and

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<sup>245</sup> *E.g.*, *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

<sup>246</sup> *E.g.*, *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545-46 (7th Cir. 2002); *Phillips v. Gen. Motor Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002).

reference a settlement only if the terms of the settlement are on file, and the content of the settlement would then be subject to public accessibility analysis by that court. For example, filing would be required when a court references a settlement in its order of dismissal. The filing of terms should not result in automatic access, though, but should prompt a case-by-case analysis as described below.

The question arises whether it is then necessary for a court to reference a settlement in an order of dismissal if settlement is indeed the reason behind the court order. Arguably, a court could help parties circumvent this proposed filing requirement by dismissing a case without reference to the settlement. This act could facilitate settlement and dismissal in cases in which the parties desire secrecy. For purposes of appeal, though, a court must often articulate the reasons for a final order,<sup>247</sup> and courts should additionally be required to mention a settlement in good faith when the settlement is a reason for dismissal. A judge concerned about the public interest would certainly want to make such a mention so that the terms of the settlement would be filed and subject to public access if appropriate. Additionally, a court would somehow learn of the settlement before it orders dismissal, be it through the receipt of a motion for dismissal or through a hearing, and the court should reference the settlement at some point in this process. Such a reference to the settlement would trigger the proposed filing requirement as well. While arguably the court may not have expended resources toward the development of the terms of the settlement in such a situation, it has expended resources and acted based on the existence of the settlement; therefore, the settlement is of public interest.

It also may be argued then that under this proposed filing requirement there is no way for parties to settle without court involvement once a complaint has been filed as there is no way to avoid the court from somehow addressing or referencing the settlement. Consequently, there is no way to avoid filing settlement terms. Some might assert that such an outcome is inappropriate because parties who file complaints ask that the court to judicially resolve the case, not that the court be involved should resolution occur through private settlement. As most parties will not settle a

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<sup>247</sup> *E.g.*, FED R. CIV. P. 52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . ."); *Principe v. Ukropina (In re Pac. Enters. Sec. Litig.)*, 47 F.3d 373, 377 (9th Cir. 1995) ("We hold that in a [Federal Rule of Civil Procedure] 23.1 [shareholder] derivative action, a district court that does not respond to objections [to a settlement] with findings of fact and conclusions of law must provide a reasoned response elsewhere in the record.").

case before they know how rigorously the other side will pursue their interests, the filing of a complaint is often necessary to trigger settlement. Once the existence of a settlement is made known to a court, though, the filing requirement would apply.

However, the plaintiff would retain the right under Federal Rule of Civil Procedure 41 to voluntarily dismiss the action, and all the parties could stipulate to dismissal without any mention of the settlement.<sup>248</sup> If a court has not addressed or referenced the settlement prior to this point, the settlement would not need to be filed with the court. Due to the public interest in the use of judicial resources, however, it would be inappropriate for a court to spend resources being apprised of a settlement without requiring that the settlement be filed. For example, if the parties mention the existence of a settlement in a meeting in chambers, the judge would need to acknowledge any discussion about that settlement and order the parties to file its terms pursuant to the court rule requiring the filing of all settlements that a court addresses or references.<sup>249</sup> It would be inappropriate, therefore, for a court to find out that a settlement agreement exists and to allow the parties to stipulate to dismissal to avoid filing.

These methods of dismissal may seem like easy ways to avoid the filing requirements, and thus seem to be techniques that will undermine any confidentiality analysis based on the filing of settlement terms. Still, many parties will want to involve the court in the settlement process to secure judicial approval of terms and to retain the court's jurisdiction. Parties who have considerably fewer resources and less experience than their opponents, a discrepancy often seen in product liability cases, may be reluctant to settle the case without at least some mention of the settlement to the experienced and neutral judge.

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<sup>248</sup> FED. R. CIV. P. 41(a)(1)(i)-(ii). Rule 41(a)(1)(i) provides that a plaintiff can voluntarily dismiss an action without court order "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first." Some courts, however, have not allowed voluntary dismissal even within this time limit if the merits of the case have been addressed. *See Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 107-08 (2d Cir. 1953) (denying dismissal when a hearing had been held on plaintiff's request for a preliminary injunction, which was denied based on the merits of the case, and when the defendants had conducted significant preparation). *But see D.C. Elecs., Inc. v. Nartron Corp.*, 511 F.2d 294, 298 (6th Cir. 1975) (stating that Rule 41(a)(1)(i) clearly does not allow judges to use discretion to create exceptions to the time limit). Rule 41(a)(1)(ii) does not provide any time limit for stipulation of dismissal by all parties. *See also supra* notes 94, 99 and accompanying text; *supra* note 114.

<sup>249</sup> However, if parties merely express the desire to enter into settlement negotiations instead of the existence of an agreement, no court order under the procedural rule would be appropriate. It is hard to imagine a situation, however, where the parties would stipulate to dismissal on the mere hope that settlement negotiations will prove fruitful.

*B. Confidentiality or Accessibility as the Default*

The next question in formulating a rule regarding settlement secrecy is whether it should generally be presumed that parties can settle confidentially, or whether it should be presumed that the public has access to all settlement information filed with a court. Jurisdictions such as Third Circuit strongly presume public access to filed settlements,<sup>250</sup> and Anne-Therese Bechamps, for example, proposes legislation that presumes access to filed settlements and enumerates when privacy should be allowed.<sup>251</sup> Jurisdictions such as the Eleventh Circuit presume confidentiality if the parties agree to it, at least in the discovery context,<sup>252</sup> and critics such as Arthur Miller and Richard Epstein argue that confidentiality is crucial to the achievement of settlement and the preservation of litigants' rights.<sup>253</sup> The latter is the better approach. A rule should allow confidentiality as a default and use a test to determine when access is appropriate, not the other way around. Litigant privacy should be the primary interest protected due to the right to contract freely, to the traditional role of dispute resolution as the primary function of civil courts, and to the importance of confidentiality to settlement facilitation and litigants' rights. Dissemination of information to the public is a mere secondary effect of the current system and thus is an improper primary aim for the courts, though public interest should certainly always be considered in confidentiality analysis.

As confidentiality is so crucial, it should not be automatically prohibited in *any* settlement situation, as occurs with bright-line rules that enumerate which subject matters cannot be settled confidentially.<sup>254</sup> Settlement confidentiality is widely considered crucial to the settlement of many cases, and arguments stating that the elimination of confidentiality, either for all cases or enumerated cases, or the creation of an extremely high standard for the granting of confidentiality, will not affect settlement rates and amounts are not convincing. Deep-pocketed defendants will not be as likely to settle without the benefit of confidentiality; indeed, they may choose to go to court in the hope of clearing their name, rather than settle and have the notified public assume wrongdoings. Since it is widely accepted that many cases settle, and that

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<sup>250</sup> *E.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994).

<sup>251</sup> Bechamps, *supra* note 6, at 118-19, 124.

<sup>252</sup> *E.g.*, *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307-08 (11th Cir. 2001) (granting the parties, absent challenge, the power to determine what discovery material remains confidential and thus unavailable to the public).

<sup>253</sup> Miller, *supra* note 21, at 463-77; Epstein, *supra* note 23.

<sup>254</sup> FLA. STAT. ANN. § 69.081 (West Supp. 2003).

many of those cases settle confidentially, it is not a stretch to assume that eliminating much confidentiality will cause courts to have to deal with more cases, many of which will be complicated, publicized, or both.

While more cases will need to be resolved through the courts if confidentiality is eliminated, plaintiffs in sensitive cases who want confidentiality will be discouraged from utilizing the court system to seek justice if it is guaranteed that personal information will become readily available to the public. Without the feasible option of using the courts to achieve justice or even to enforce their out-of-court settlements, plaintiffs in sensitive cases who desire confidentiality, but who are involved in a situation in which confidentiality is prohibited, will have absolutely no recourse against a defendant who is unwilling to settle or is unwilling to carry out agreed-upon settlement terms.

Therefore, the allowance of confidentiality should be a general default, and the possibility of confidentiality should not be automatically removed for any type of settlement.

### *C. Balancing vs. Bright-Line Tests*

Judge Easterbrook of the Seventh Circuit has opined that in legal situations with recurrent factual patterns, bright-line rules are appropriate so that people are able to determine the legality of their actions before they act:

A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision. . . . People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. . . . [W]e should be able to attach legal consequences to recurrent factual patterns.<sup>255</sup>

However, since so many cases of so many types settle, it is difficult – if not impossible – to break down cases that settle into discrete categories and to formulate absolute bright-line rules for those types of cases. Gray area necessarily exists with any category definition. Due to this gray area, some cases will defy categorization, fall into several categories, or inadvertently be wrongly categorized – thus causing inappropriate rules to be applied to

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<sup>255</sup> Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) (arguing that a bright-line rule should be used to determine if the Fair Labor Standards Act applies to migrant farm workers).

cases. Even if categories could be well defined, a bright-line rule is still not appropriate. Even within a seemingly well-defined general type of settlement, such as products liability settlements, facts differ too much to make a bright-line test appropriate and fair for all the cases even in this category.

For example, even if most product liability cases contain information from which the public would benefit, fact patterns do exist where settlement information would provide no such public benefit. A product may no longer be widely in use, and thus the public may not greatly benefit from the settlement information, while potentially private information about the plaintiff's product use and injury may be revealed. A product may have been used extremely incorrectly or unusually, and thus settlement information again would not benefit the public.<sup>256</sup> Additionally, some cases are frivolous and without merit, but defendants may settle anyway rather than give the plaintiff further attention and use additional resources, and again this settlement information would not be useful. The public, however, is likely to view any settlement as evidence of defendant culpability, and the public may therefore erroneously think a danger exists where it does not. The public may then be reluctant to use a potentially beneficial product, and a defendant manufacturer may suffer financial harm and injury to its reputation for no reason. While these examples of situations that create misleading settlement information may not represent the majority of product liability cases, even a few potential instances of undesirable confidentiality outcomes is sufficient to at least show that a bright-line approach to general types of cases is inappropriate. In cases in which the public would not benefit from settlement information, a party should have the opportunity to argue that the party's interest in confidentiality outweighs public interest in the information, and a court should be able to grant confidentiality.

Using a general bright-line approach, but granting the court some discretion or recognizing a court's inherent power to override that bright line may seem like a step in the right direction. But such an approach does not explicitly define what a judge must consider in determining whether a case falls within an exception. Thus the same problems of inconsistency and inappropriate judicial policy decisions arise as they do with a generally applied but ill-defined balancing test. Additionally, even if exceptions to the

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<sup>256</sup> Epstein, *supra* note 23 (arguing that some vehicles in the Firestone/Ford litigation were pushed beyond their performance limits in extreme conditions and that such misuse is often overlooked in liability cases).



bright-line rule are well defined, such an approach undervalues litigants' right to privacy as that right is only assessed in exceptional cases and even then is typically presumed to be weak or nonexistent.

A balancing approach is more appropriate when deciding whether the public should have access to settlement information. A blanket, across-the-board balancing test for all types of settlements is not appropriate, though, due to the unique public interest in certain types of cases. For the same reasons that many courts, legislatures, and scholars want to enumerate certain situations in which confidentiality should never be allowed, it is necessary to apply a different balancing test to some cases. Courts and settlement confidentiality have been discussed for many years, and courts, legislatures, and scholars repeatedly identify the same fact patterns as problematic – especially mass torts and product liability cases and sexual abuse cases.

However, due to the difficulty of concretely defining such categories and to the possibility of factual situations in which a litigant's interest in privacy outweighs the public interest in access, judicial discretion remains necessary, and a bright-line rule even for the enumerated categories is not appropriate. A better rule enumerates cases that are held to a heightened standard in which balancing factors are weighed differently and by which it is easier for the public to gain access. A balancing test that presumes a strong litigant interest in confidentiality should be applied to all other cases, by which public access is more difficult to obtain. As confidentiality would be allowed in most cases, the confidentiality that is so important in our legal system would not be greatly reduced, and few people would be discouraged from using the legal system.

#### *D. Differences Between the Two Tests Proposed*

Two related but distinct balancing tests should be used by courts to determine when public access to settlement information is appropriate – one that is applied to settlements containing certain enumerated subjects and one that is applied to all other settlements. The two tests can even require consideration of the same factors, but the tests need to provide different weights for those factors depending on the type of case at issue.

This proposed rule recognizes the importance of confidentiality overall and treats confidentiality as an overall default by not prohibiting confidential settlements for any case and by requiring judicial consideration of each settlement and its involved interests

on a case-by-case basis. However, the two balancing tests should start with different presumptions. The majority of settlements, those that do not pertain to enumerated subjects, should carry a strong presumption against access and thereby weigh litigants' privacy interests heavily. This general, standard test would be applied to most cases and thus would allow confidentiality most of the time. The balancing test that would be applied to the smaller number of settlements involving enumerated subjects, however, initially should weigh public interest more heavily than privacy interests. This test that is applied to settlements involving special circumstances still must require a case-specific balancing, and thus the privacy interests of individual litigants must always be considered. Even when applying the test to be applied to special circumstances, a judge would retain discretion to override the presumption of access in any particular case.

The presumptions for the two tests should be strong, which reduces the predictability problem that Easterbrook and others identify as resulting from balancing tests. Confidentiality will generally be allowed for most settlements, absent a very strong public interest, and confidentiality will not generally be allowed for settlements containing enumerated subject matter, absent a very strong litigant interest in privacy. It can be argued that the judicial discretion that must be exercised when applying any balancing test makes the use of two different tests unnecessary because a judge could effectively apply a presumption of access to every case (or a presumption of privacy, depending on the stance of the critic). However, the use of a strong presumption determined by the classification into relatively easy-to-recognize categories, along with the use of a defined balancing test, makes it unlikely that judges will apply the tests erratically. Additionally, many legal rules can be overcome by judicial discretion,<sup>257</sup> and many legal tests require balancing; such rules are applied without the judicial discretion resulting in widespread problems. Applying the discretion argument to this proposed rule is no different than applying it to balancing tests generally. The appeals process also would protect litigants and the public from any occasional gross error on the part of judges who conduct the balancing.

Additionally, as required by Bechamps' model legislation,<sup>258</sup> any sealing order should specify the documents to be sealed, the reasons for sealing, and the duration of the order. Likewise, an order denying a motion to seal shall specify the reasons for not

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<sup>257</sup> *E.g.*, D.S.C. LOCAL CIV. R. 1.02 (Law. Co-op Supp. 2002).

<sup>258</sup> Bechamps, *supra* note 6, at 144-46.

sealing. Requiring a judge to explain his or her balancing process, and to explain the nature and the relative importance of the specific interests involved, will also reduce erratic, judge-specific confidentiality decisions by holding judges accountable. It will enable judges to make their decisions more consistent with those made in other cases and by other judges because decisions and processes can be compared in detail. Providing such detail will also make it possible (at least theoretically) for all people to re-search the decisions made in similar cases and to therefore predict a legal outcome before they act.

The question arises whether any court analysis should be required when a settlement is filed and the parties do not object to public access. Parties may want to stipulate access in order to avoid the time and cost of addressing the appropriate balancing factors when confidentiality is of no personal importance to them. As litigants' right to contract should be respected, and as some public right of access to our judiciary system has been recognized and has been viewed as necessary to the system,<sup>259</sup> such agreements to access should generally be honored and should eliminate the need for much of the in-depth case-by-case analysis required by this rule. It should generally be the job of the parties involved to seek confidentiality, and in doing so, to argue when public access would not be beneficial or would be misleading. Confidentiality should not be at issue if no such arguments are made. A court should not generally analyze confidentiality *sua sponte*, but the court should retain the discretion to do so if extreme circumstances arise in which confidentiality seems very necessary despite the lack of party arguments in favor of secrecy. If, for example, settlement information would likely stop the public from using a beneficial product or access would likely harm a vulnerable party such as a minor, the judge may be prompted to analyze the desirability of access; however, it is difficult to imagine such a situation arising in which an original party or another interested intervenor would not seek confidentiality by its own motion. Therefore, a judge should look over an agreement of access to make sure an extreme need for confidentiality does not exist, and the judge should make some written indication as to the reason why confidentiality was not further considered. Overall, when a settlement is filed, a court will carefully analyze the need for public access only if a party objects to such access.

While it may be argued that it will be burdensome to the courts to require the application of a balancing test and the devel-

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<sup>259</sup> See *supra* notes 36-53 and accompanying text.

opment of a written explanation for every settlement that involves a court in which confidentiality is sought, the use of strong presumptions should make balancing easier and quicker, and access to the explanations made in past cases and by other judges should prevent a judge from having to "reinvent the wheel" with every settlement. Even so, it may be argued that the application of even an easy balancing test will be burdensome for the courts due to the requirement that parties file, and courts balance, every settlement in which confidentiality is an issue and in which the court is involved or addresses. As so many cases settle after a court has become involved in some way, such as after the filing of a complaint, the requirement will encompass a great number of settlements.

Once judicial resources have been expended on a case, though, a prohibitive amount of additional resources will not be required for the court to do the additional balancing required by this rule, especially if a judge is already familiar with the case. A hearing may not even be necessary as a judge can require parties to file briefs addressing the relevant balancing factors at the time settlement terms are filed with the court, if confidentiality has been requested by that point, or at the point when confidentiality becomes an issue. A ruling can then be made based on motions and on the paper record. Parties will not likely even seek confidentiality unless they have a strong interest in such secrecy due to the cost of addressing the balancing test even through written briefs; as explained above, few judicial resources will be used if parties do not object to public access. As many filed settlements will not require judicial confidentiality analysis for the simple reason that the parties do not seek secrecy, the burden on the courts created by the proposed rule will not be prohibitive. Additionally, judicial resources are often used even with bright-line rules to determine how and whether a fact situation falls under the test.

In looking at the bigger picture, courts would not be required to apply the proposed balancing tests to settlements that are not filed either voluntarily by the parties or as required due to some court involvement in, or reference to, the settlement. Where the tests are applied, the application of a more uniform and predictable confidentiality test may reduce the number of appeals and remands based on confidentiality, and thus may reduce the burden on the judicial system overall. The application of a predictable confidentiality test may make it more likely that parties concerned about confidentiality will negotiate and comply with settlements without utilizing the courts because those parties will better be able to predict what a judicial outcome regarding confidentiality would be.

There will be less reason to go to court regarding confidentiality due to the narrowing of the opportunity to try to talk a judge into granting anomalous results not clearly prescribed by the proposed tests.

### *E. Special Enumerated Types of Settlements*

The public has a particularly strong interest in cases concerning national security, government entities or representatives, product liability and mass torts, sexual violence and predation, and substantial threats to public health and safety. While gray areas exist within these categories, especially regarding national security, judges would retain the discretion to decide which settlements fall into the enumerated categories. Jurisdictions and scholars seem generally to accept these categories and consider them reasonably easy to recognize and apply. Although this list necessarily cannot encompass all settlements in which the public has an interest and should have access, under the rule proposed in this Note, public interest is considered and weighed even with settlements that do not involve enumerated subjects.<sup>260</sup> Settlements that are not enumerated, cases that fall into gray areas, and cases that are incorrectly considered to be enumerated or not enumerated will not be subject to an inappropriate bright-line rule.

### *F. Factors to Balance and Weights to Assign*

Although it does recognize a weak presumption in favor of access, Laurie Dore's test generally favors confidentiality and is thus an appropriate model for the proposed general balancing test to be used with most settlements in which confidentiality is sought.<sup>261</sup> Similar to Dore's test, the proposed balancing test for most settlements recognizes the possibility of access in all situations by requiring case-by-case balancing, but the proposed test has a strong presumption in favor of confidentiality. In support of confidentiality, a judge should strongly weigh party reliance upon the sealing order, the importance of confidentiality in achieving the settlement, and any harm that may result to the parties if confidentiality is not allowed, including both monetary and reputational harm. Confidentiality does not need to be the least restrictive way

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<sup>260</sup> As the rule proposed in this Note requires a court to weigh interests in every case, this specific list of enumerated topics is not central to the general approach proposed. While this author believes that the list used in this Note is most appropriate, a court could adopt a different or modified list of enumerated subjects and still follow this Note's proposed general approach of subjecting enumerated cases to a presumption of access and non-enumerated cases to a presumption by which confidentiality is allowed.

<sup>261</sup> See *infra* Part III.B.

of protecting the litigants' interests. Public policy in favor of settlement and case resolution should be considered strongly.<sup>262</sup>

In support of access and thus overcoming the presumption, a judge should weigh less strongly an unusual or compelling need for public access and the extent to which access to the settlement information furthers the objectives of public access – to facilitate public monitoring of the judicial system, to enhance public confidence in the system, to educate the public, and to ensure fair and accurate fact-finding.<sup>263</sup> The public's interest increases as the amount of judicial action increases and the further the proceeding had progressed prior to settlement. However, a judge should be careful to identify and disregard public interest that is mere curiosity, especially in cases with plaintiffs especially vulnerable to public curiosity. Satisfaction of this type of public interest does not further the objectives of public access. A judge should rarely grant access if the public has alternative ways of obtaining the information.

As Sharon Sobczak's definitions of the balancing factors weigh in favor of access, her test is an appropriate model for the special balancing test that should be applied to settlements involving the enumerated subjects.<sup>264</sup> The test begins with a presumption of access. The special test should be applied to settlements involving the enumerated subjects: national security, government entities or representatives, product liability and mass torts, sexual violence and predation, and substantial threats to public health and safety. Like Sobczak's test, the proposed test strongly presumes public access for settlements containing these subjects. Public figures should not be protected from access any more than should "regular" plaintiffs. In favor of access, a judge should weigh heavily the public's interest in the enumerated information contained in the case. The interest is stronger the more judicial action has occurred and the further into the proceeding settlement has occurred. The judge should consider strongly how the information contained in the case will help inform the public and further similar cases. The fact that the public has alternative means of obtaining the same public interest information need not preclude access to these settlement records. Public policy in favor of settlement and case resolution need not be considered strongly.

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<sup>262</sup> Once again, while this author feels that these balancing factors are most appropriate, a court could adopt different balancing factors and still follow this Note's proposed general approach of subjecting enumerated cases to a presumption of access and non-enumerated cases to a presumption by which confidentiality is allowed.

<sup>263</sup> Dore, *supra* note 4, at 402.

<sup>264</sup> See *infra* Part III.B.

In favor of confidentiality and thus overcoming the presumption, a judge should consider less strongly the nature and magnitude of the harm that may result to the parties if confidentiality is not allowed. As with Sobczak's test, litigants should have to show with evidentiary support a high probability that the harm will occur. Monetary damage should be weighed more heavily than damage to one's reputation. Party reliance and the importance of confidentiality to the achievement of settlement should be considered very weakly, if at all, because it is generally not reasonable for parties in these enumerated situations to rely on confidentiality. Nor is it reasonable for them to formulate settlements that turn on confidentiality because of the strong legal presumption against secrecy in these easy-to-recognize situations. The court should only support confidentiality when it is certain that there is no less restrictive way of protecting the parties' interests, such as the sealing of only certain documents or the use of initials or pseudonyms.

Under both tests, confidentiality and access are possibilities, and judges retain discretion to balance the factors based on the case at hand.

### *G. Implementation of the Tests*

Changes in ethical rules that require attorneys to consider the interests of the public would certainly work toward the same end as would the rule proposed because this Note argues that the public does have an interest in and should have a right of access to some settlement information. However, even an ethical rule that requires attorneys to disclose settlements containing significant public information is not the best solution for several reasons. First, the rule would create a problem of inconsistent results as attorneys "read" their cases differently and thus interpret differently the interests involved. For example, due to personal experiences and interests, repeat products liability defense attorneys would likely view the public interest in a case quite differently than would repeat products liability plaintiffs' attorneys. As an ethical rule would still be based on a reasonableness standard (either objective or subjective),<sup>265</sup> such differences in view would likely be permissible under an ethical rule and would result in inconsistent results.

Additionally, a rule that requires an attorney to disclose settlements containing certain types of information presents the same problems as bright-line rules that require automatic access based

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<sup>265</sup> See Zitrin, *supra* note 13, app. A (setting forth Proposed Model Rule 3.2(B), presented to ABA Comm. on Evaluation of the Rules of Prof'l Conduct, Feb. 2001, which contains both objective and subjective alternate language).

on subject matter and do not allow for case-by-case assessment. Lastly, an attorney could make an inappropriate decision and allow disclosure of settlement information before judicial review determines that confidentiality is appropriate, creating a situation that cannot possibly be corrected. It is a far better approach to have the interests involved defined and weighed by a neutral judge before access is required. While it can be argued that a judge is not neutral due to his or her participation in the proceeding prior to settlement, he or she would certainly be more neutral than an attorney who regularly serves as a compensated advocate.

The other two widely used means of achieving such a rule are court rules and legislation. A court rule is the preferable means of implementing the proposed rule because a judiciary that has created and applied other balancing tests in the past is likely more competent at defining distinct balancing factors and presumptions than is a legislature. Additionally, it may be a lengthier and more complicated process to draft and pass legislation than it is to draft and pass court rules due to bicameral legislative systems and to the influence of representatives and constituents with opposing interests. It would certainly be possible, though, for legislation to achieve the same result as a court rule.

## V. APPLICATION OF THE PROPOSED TESTS

### A. *AIDS Status and Sensitive Medical Information*

Critics of sunshine reforms argue that under such reforms a litigant may be required to divulge too much personal information, such as one's AIDS status, which could be considered health and safety information.<sup>266</sup> David Luban defends sunshine regimes against this privacy argument by arguing that personal information, such as an individual's AIDS status, would not be considered health and safety information in which the public has an interest. Additionally, Luban argues that a judge could treat such a case as an exception even if the information is thought to have public ramifications.<sup>267</sup>

The proposed rule does not rely on a narrow definition of public health and safety information or on the formulation of some kind of exception to protect such a litigant. Even if a litigant's AIDS status is considered a substantial threat to public health and safety, thus triggering the special test, that litigant's privacy may

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<sup>266</sup> Luban, *supra* note 5, at 2653-54 (identifying and refuting this argument).

<sup>267</sup> *Id.* at 2654.



still overcome the presumption of access, especially if settlement occurs early in the proceeding and without much judicial action. Though the judge should weigh heavily the public's interest in the AIDS information, and thus should weigh heavily any risk of transmission to members of the public, the judge may find that the litigant has an even larger interest in privacy because such information carries a stigma in our society and may prompt unnecessary fear, prejudice, and even hate crimes.

To show a high probability of harm, the litigant could show, for example, that he or she works at a place of employment where coworkers are very likely to develop unnecessary fear of the litigant if informed, such as a place where workers who are unlikely to be educated about AIDS work in close proximity. The litigant could show that because the disease is highly stigmatized and not well understood, even limited revelation of the litigant's AIDS status risks the creation of devastating gossip that would quickly spread; thus, confidentiality is the only way to protect the litigant. Perhaps due to the uniqueness of the case in a small community or close environment, the use of initials or pseudonyms would not protect the litigant's identity. Even with the application of the special test, the judge would retain discretion to protect the litigant's privacy in these types of situations.

Other confidential settlements relating to medical health have involved mistakes by pharmacies in dispensing medication and repeated instances of provider malpractice.<sup>268</sup> Such settlements are likely to be found accessible to the public under the special test because the medical information involved is likely to be considered public health information, and the medical information the settlements would reveal is likely less sensitive than AIDS information. However, sensitive procedures or medication types may be protected after case-by-case balancing is conducted through a complete sealing of the settlement, as well as through the use of pseudonyms or other identity protection measures.

### *B. Sexual Abuse by Clergy*

Experts and the media estimate that at least 850 and as many as fifteen hundred Catholic priests in the United States have been accused of child sexual abuse over the last four decades.<sup>269</sup> Ex-

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<sup>268</sup> *60 Minutes II*, *supra* note 16 (Internet coverage of the Jan. 15, 2003, lead story on 60 Minutes II with Dan Rather, addressing settlement confidentiality and the South Carolina rule).

<sup>269</sup> Alan Cooperman & Lena H. Sun, *Hundreds of Priests Removed Since '60s, Survey Shows Scope Wider Than Disclosed*, WASH. POST, June 9, 2002, at A1 (citing a survey of Catholic dioceses across the United States conducted by the paper and Sylvia Demarest, a plaintiffs' lawyer in Texas who compiled a database in the mid-1990s of priests accused of sexual

perts and church officials estimate that between one and six percent of all priests in the United States have committed child sexual abuse.<sup>270</sup> Generally, church officials are reluctant to talk about legal settlements that arise from these cases. While a *Washington Post* survey found only \$106 million in payments has been acknowledged by the church as of June 2002, plaintiffs' lawyers estimate that the true amount of settlement approximates \$1 billion, and that most of those settlements have been confidential.<sup>271</sup> Evidence suggests that priests have been kept in positions that involve contact with children or have been repeatedly shuffled across parishes, despite evidence or strong suspicion of past sexual misconduct.<sup>272</sup> Law enforcement and the judiciary are accused of contributing to the church's cover-up of the problem by failing to conduct or dropping investigations and by conducting proceedings in secret.<sup>273</sup> The Catholic Church is only one of many religious organizations facing such accusations.<sup>274</sup>

The Superior Court of Connecticut recently ordered the unsealing of discovery records in twenty-three settled cases alleging sexual abuse of minors by clergymen affiliated with the Bridgeport Roman Catholic Diocese and accusing the diocese of a cover-up.<sup>275</sup>

misconduct). However, as of June 2003, it was estimated that 425 priests had been removed from the ministry for abuse in the previous eighteen months alone. Cathy Lynn Grossman, *A Year After Church Scandal, Problems Amid Progress*, USA TODAY, June 17, 2003, at 8D (citing the Rev. Robert Silva, president of the National Federation of Priests' Councils).

<sup>270</sup> Cooperman & Sun, *supra* note 269 (citing A.W. Richard Sipe, a former priest who is now a psychotherapist who counsels clergymen and victims, and Cardinal Theodore McCarrick of Washington).

<sup>271</sup> *Id.* Several larger known settlements that were listed by USA Today in June 2003 total over \$300 million. Grossman, *supra* note 269. In October 2003, an \$85 million settlement between the Boston Archdiocese and hundreds of alleged victims went into effect after 80% of the victims approved the agreement. *Most Plaintiffs Accept Boston Abuse Settlement*, CHI. TRIB., Oct. 21, 2003, at C19.

<sup>272</sup> E.g., Edmund H. Mahony & Dave Altamari, *A Predatory Trail, A Futile Pursuit, Priest Questions Motives of Accusers*, HARTFORD COURANT, Aug. 11, 2002, at A1; Lois Romano, *Okla. Archbishop Failed to Oust Priest, Long Trail of Abuse Prompts Criticism*, WASH. POST, May 21, 2002, at A1. In November 2003, Cincinnati Archbishop Daniel E. Pilarczyk pleaded no contest to five misdemeanor counts of failing to report felonies. The charges involved a long-standing cover-up of sexual abuse by priests in the archdiocese. This case marked the first time that an archbishop or bishop entered a plea that resulted in guilt. Bill Sloat & T.C. Brown, *Cincinnati Archdiocese Found Guilty of Cover-Up*, PLAIN DEALER (Cleveland), Nov. 21, 2003, at A1.

<sup>273</sup> E.g., Mahony & Altamari, *supra* note 272 ("The sealing of lawsuits against priests was common, particularly when it came to trying to protect the identity of the accuser."); Romano, *supra* note 272. These newspaper articles both state that confidential settlements were paid to the victims of the priests featured.

<sup>274</sup> Teresa Watanabe, *Sex Abuse by Clerics - A Crisis of Many Faiths*, L.A. TIMES, Mar. 25, 2002, at A1 ("The wave of clergy sex scandals now engulfing the Roman Catholic Church has battered other denominations as well . . . . In the last decade, clergy sexual misconduct has been exposed in virtually every faith tradition.").

<sup>275</sup> *In re N.Y. Times*, X06-CV-02-0171932-S, 2002 Conn. Super. LEXIS 1634, 32 CONN. L. RPT. 228 (Conn. Super. Ct. May 8, 2002) (unpublished), *rev'd*, *Rosado v. Bridgeport Ro-*

The twenty-three cases include allegations of forcible rape of children by priests and accused the diocese of a conspiracy involving the reassignment of priests and the "bullying and/or misinforming" of the victims.<sup>276</sup> The Superior Court used a balancing test, finding an "extraordinary" public interest in the allegations that outweighed the priests' or church's interest in privacy, especially in light of recent attention given to and acknowledgment of such abuse by the church and the media.<sup>277</sup> The court found it "inconceivable" that the defendants could have any overriding interest.<sup>278</sup> The court found the public to have a strong interest not only in the allegations themselves, but also in the diocese's response to the allegations and in any court facilitation of a cover-up through the use of sealed records.<sup>279</sup> The court did not specifically discuss the privacy interests of the alleged victims.

The orders to unseal, however, were stayed and recently reversed because the Appellate Court of Connecticut held that the trial court had effectively restored the twenty-three cases to the docket beyond the time limit allowed by state statute. The Court held that the court had committed other procedural errors as well.<sup>280</sup> The appellate court noted that the newspaper was well aware that accusations had been made against priests at that time, and "[h]ad the newspaper acted earlier, they could have received a proper hearing on the merits of the claims and might have won some, or even all, of the relief . . . ."<sup>281</sup>

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man Catholic Diocesan Corp., 825 A.2d 153, 172, 179, 185-87 (Conn. App. Ct. 2003). There is no indication in this case or its subsequent history that settlement information was included in the records.

<sup>276</sup> *In re* N.Y. Times, 2002 Conn. Super. LEXIS 1634, at \*10-11.

<sup>277</sup> *Id.* at \*14-\*16.

<sup>278</sup> *Id.* at \*14.

<sup>279</sup> *Id.* at \*17-18.

<sup>280</sup> *Rosado*, 825 A.2d at 172, 179, 185-87.

<sup>281</sup> *Id.* at 186-87. While the orders were stayed, the trial court criticized the appellate court's focus on procedure:

The church's sexual abuse scandal has not been exposed by the courts. Courageous victims and enterprising investigators have circumvented a judicial model of cooperation with the Diocese in endlessly delaying litigation, sealing files and coercing victims into non-disclosure settlements. Rather than seeing the elephant in the courtroom, we are diverted to the presence of the mouse, the issue of which files should have been used.

For this court to ignore its inherent powers over its own files, behind the fig leaf of a hypertechnical understanding of its jurisdiction, would be a dereliction of duty, indefensible morally as well as legally.

*Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, AC-23014, 2002 WL 1837910, at \*6, 32 Conn. L. Rptr. 514 (Conn. Super. Ct. June 12, 2002) (unpublished) (addressing orders by the Appellate Court to act on pending motions to intervene and to articulate the court's basis for authority to open a new file). In response, the appellate court noted that a charge of judicial impropriety "places a stain on the court that cannot easily be erased" and that this criticism was "especially regrettable" because it was made without evidence and by a judge. *Rosado*, 825

In two recent cases, the Superior Court of Massachusetts also ordered the unsealing of records from eight settled cases involving alleged sexual abuse of children by priests, but the court did leave the plaintiffs' identities and identifying information sealed.<sup>282</sup> Applying a good cause test that required a compelling interest in order to seal,<sup>283</sup> the court found that "for many victims of sexual abuse, especially child sexual abuse, public revelation of the abuse, if not sought by them, victimizes them yet again" as it stigmatizes them as victims, generates painful conversations, and causes others to treat them differently.<sup>284</sup> While the court found this interest in privacy enough to justify the sealing of the plaintiffs' identities, the court did not seal the rest of the records: "[A]part from the interests of the plaintiffs in protecting disclosure of their identities, there is no interest so compelling as to override the common law and constitutional presumption of public access to court records."<sup>285</sup>

Nor did the court find that the defendants' interest in privacy justified additional sealing. While acknowledging that the accused priests would indeed suffer harm to their reputations due to the unsealing of the records, the court found that the public interest in knowing which members of the clergy had been accused of child sex abuse and what steps had been taken by the church in response to accusations was "immense," especially for those members of the public who belong to the same religious institutions as the defendants.<sup>286</sup> Keeping the defendants anonymous would make it far more difficult for the public to evaluate their own religious institutions. Additionally, the court noted that courts rarely find privacy rights for alleged victimizers in civil cases and virtually never in criminal cases.<sup>287</sup> As one of the sealed cases was a complaint for settlement approval on behalf of a minor to resolve allegations of sexual abuse by a member of the clergy, it is likely that settlement terms were contained in the unsealed records.<sup>288</sup>

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A.2d at 167.

<sup>282</sup> *Globe Newspaper Co. v. Clerk of Suffolk County Superior Court*, 01-5588-F, 2002 Mass. Super. LEXIS 6 (Mass. Super. Ct. Feb. 4, 2002); *Globe Newspaper Co. v. Clerk of Middlesex County Superior Court*, CA2001-5302-C, 2002 Mass. Super. LEXIS 67 (Mass. Super. Ct. Mar. 5, 2002).

<sup>283</sup> *Globe Newspaper*, 2002 Mass. Super. LEXIS 6, at \*11-12.

<sup>284</sup> *Id.* at \*19.

<sup>285</sup> *Id.* at \*28.

<sup>286</sup> *Id.* at \*26.

<sup>287</sup> *Id.* at \*27 (citing *Doe v. Diocese Corp.*, 647 A.2d 1067 (Conn. Super. Ct. 1994) (forbidding the use of a pseudonym by a clergy member accused of child sexual abuse); *United States v. Maling*, 737 F. Supp. 684, 705-06 (D. Mass. 1990) ("The defendant must live with his name and its attendant reputation.")).

<sup>288</sup> *Globe Newspaper*, 2002 Mass. Super. LEXIS 6, at \*3 n.2.

Where such a case involves filed settlement information, the proposed special balancing test would be applied as these cases regard sexual violence and predation, and public access would be strongly presumed. In weighing heavily the public's interest in the enumerated information contained in the case, the judge would likely find a very strong public interest, as did the trial court judges in the Connecticut and Massachusetts cases. Again, the interest is stronger the more judicial action occurred in the case and the further into the proceeding settlement occurred. The judge would likely find that the information contained in the case, including the identities of the defendants, would help enable the members of the public to better protect their children and help their own religious institutions fight abuse, especially if no other means of access to the names of accused priests exists. The acute harm that occurs from sexual abuse makes public knowledge of the risk more crucial.

The harm to the priests that would result from disclosure would very likely not be compelling enough to prevent the disclosure of the defendants' identities. The public interest in knowing the defendants' identities is important, for example, to enable parents to determine if their own children have been put at risk. A judge may allow the victims to be protected by pseudonyms in order to prevent serious emotional harm, but it is likely that the judge would not find it necessary to seal all the settlement information to protect victims' privacy interests.

Most people would agree that the result of public access is correct in this situation because of the unique trust that people put in members of their religious institutions, and because of the acute need to prevent such abuse due to the very serious physical and emotional harm that victims of sexual abuse, especially young victims, suffer. It may be argued that the proposed rule is not necessary as the trial courts in these clergy cases came to the right results using their existing rules. However, the reversal of this "right" outcome in the situation of the Bridgeport cases due to procedural problems, and the fact that the information was left sealed upon the dismissal of each case in the first place, suggests how important it is that courts come to appropriate results at the district court level through the use of regularly applied and well-defined procedures, even if settlement information was not specifically at issue in the Bridgeport situation. Consistent, predictable results are necessary to preserve the fairness of our judicial system and to save court resources in the appellate process, as well as party resources spent in an attempt to anticipate varying court results.

Additionally, as such a small percentage of cases are published, it is difficult to know how many cases do come out appropriately at the trial court level or how many outcomes are changed on appeal.<sup>289</sup>

### C. Sexual Abuse in Schools

In allegations similar to those made in many clergy sexual abuse cases, many schools have been criticized for letting employees accused of sexual misconduct resign under the terms of confidential settlements that restrict the schools from revealing any information about the possible misconduct to schools that later seek employment references.<sup>290</sup> In a recent case, the Eighth Circuit Court of Appeals found that a school district's provision of a neutral letter of recommendation, written pursuant to a confidential settlement with a teacher accused of abuse while employed by the district, "[did] not rise to the level of deliberate indifference" necessary for the federal section 1983 claim brought against the district by a student abused by the teacher during later employment.<sup>291</sup>

The victim accused the district, a state actor, of violating her constitutional right to bodily integrity under the Due Process Clause of the Fourteenth Amendment.<sup>292</sup> The court found that the district did not possess the necessary culpability of indifference to the constitutional violation because it did not know with certainty that abuse occurred during its employment of the teacher.<sup>293</sup> Additionally, the plaintiff did not show that there was a direct causal link between the district's failure to tell the future employer of the previous allegations and the violation of the victim's rights during the later employment.<sup>294</sup> The court went on to say that the provision of the neutral letter, which contained information such as activities in which the teacher participated, his adherence to school

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<sup>289</sup> According to figures published by the Administrative Office of the United States Courts, the federal courts of appeals resolved 27,758 cases on their merits during the twelve-month period ending on September 30, 2002. ADMIN. OFFICE OF THE U.S. COURTS, JUD. BUS. OF U.S. CTS. 2002: ANN. REP. OF THE DIRECTOR, tbl. S-3 (2003) (excluding the Court of Appeals for the Federal Circuit), available at <http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf>. Only 4,920 of these cases resulted in a written, signed, published opinion in which the court addressed the facts and applicable law. *Id.* Only 416 cases resulted in a written, unsigned, published opinion discussing the facts and law. *Id.* Sixty-four cases generated a written, unsigned, published opinion that did not contain analysis. *Id.* Overall, 80.5% of the cases terminated on their merits were resolved without publication. *Id.*

<sup>290</sup> Ralph D. Mawdsley & Steven B. Permeth, *Nondisclosure Provisions in School District Settlement Agreements*, 163 EDUC. LAW REP. 2 (2002).

<sup>291</sup> *Shrum v. Kluck*, 249 F.3d 773, 780 (8th Cir. 2001).

<sup>292</sup> *Id.* at 777-78.

<sup>293</sup> *Id.* at 780.

<sup>294</sup> *Id.*

procedures, and that he "showed an interest in his students,"<sup>295</sup> was not reckless because "a reasonable person reading the letter might 'read between the lines' and realize that it did not unreservedly endorse Kluck as a teacher."<sup>296</sup> Lastly, the court rejected a Title IX claim because the district did not have control over the teacher at the time of the abuse in question.<sup>297</sup>

The district had opted to settle with the teacher due to the cost of conducting a hearing as required by the termination procedures mandated by the teacher's employment contract.<sup>298</sup> The settlement contained several requirements: that the teacher be permitted to voluntarily resign; that the superintendent write a positive letter of recommendation; that future references be consistent with the letter; that the resignation would be categorized as "with good cause"; and that the teacher be allowed to remove all documentation from his employment file except that which the district used when hiring him.<sup>299</sup> Implicitly, the court upheld the use of a confidential settlement agreement under these facts involving sexual predation.

Likewise, the Supreme Court of Colorado held a school district liable for breach of contract and for tort claims when the district disclosed information to the media about allegations of sexual harassment by the district's former superintendent, which were supposed to remain confidential pursuant to a settlement agreement.<sup>300</sup> The court stated that "the members of the Board clearly concluded at the time they entered into the agreement that the public interests in the efficient administration of the school system outweighed considerations regarding the accessibility of this information to the public."<sup>301</sup> Thus, the court left it to the parties to consider the public's need for the settlement information, and it considered confidentiality to be appropriately bargained for in this situation involving sexual misconduct by a public school official.

A California appeals court, however, did not uphold the use of confidentiality under similar facts. Following allegations of rape and sexual misconduct involving four high school students, a

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<sup>295</sup> *Id.* at 776.

<sup>296</sup> *Id.* at 780.

<sup>297</sup> *Id.* at 781-82.

<sup>298</sup> *Id.* at 776.

<sup>299</sup> *Id.*

<sup>300</sup> *Pierce v. St. Vrain Valley Sch. Dist.*, 981 P.2d 600 (Colo. 1999). Even though this case involves the sexual harassment of district employees and not students, it is worth noting here due to its strong approval of the parties' ability to contract confidentially. Additionally, sexual harassment of an employee by a supervisor is arguably sexual predation due to the power discrepancy between the parties. See the following discussion of employment cases, *infra* Part V.D.

<sup>301</sup> *Pierce*, 981 P.2d at 607.

school district and a former teacher entered into a settlement containing a confidentiality provision.<sup>302</sup> The court held that because the school had an obligation to report the allegations to the state Commission on Teacher Credentialing, the confidentiality provision was in violation of public policy.<sup>303</sup> A similar holding was recently reached by a Missouri appellate court, which found that where a confidential settlement agreement was reached by the school board, the state's open meeting law superseded the agreement's confidentiality provision, and thus the existence of the settlement could not be kept secret.<sup>304</sup>

For the sake of analysis, it is assumed that these settlements were filed with the court and thus would trigger the proposed rule. These school cases would be subjected to the special balancing test and a presumption of access as they involve sexual violence or predation, and public school settlements would additionally be subjected to the special test because they involve government entities. Essentially, the subject matter involved in these education situations is similar to that involved in the clergy abuse situations – a person in power is taking gross sexual advantage of someone in an inferior position, typically a child. The analysis would be similar and would very likely result in access to these settlements. Access is even more likely in these particular school situations involving settlements between the employees and the districts as the identities of the abused students are not mentioned in the settlements. The reputational concerns of the parties involved, like those of accused priests and church, would likely not be enough to support confidentiality. As in the clergy cases, all of the accused have close contact with children, and therefore the public, including future employers, likely has a very strong interest in the settlement information so that later abuse can be avoided. With public schools, the public would have an even stronger interest due to the schools' use of government money. Under the proposed special balancing test, the courts that tolerated confidentiality in the educational cases described above likely came to the wrong result.

Settlements between the districts and victims of abuse at school would be analogous to the clergy cases in which settlements were reached between the dioceses and victims. Such a situation was addressed by a California appeals court when a media pub-

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<sup>302</sup> *Picton v. Anderson Union High Sch. Dist.*, 57 Cal. Rptr. 2d 829, 831 (Cal. Ct. App. 1996).

<sup>303</sup> *Id.* at 833.

<sup>304</sup> *Calvert v. Meherville R-IX Sch. Dist.*, 44 S.W.3d 455 (Mo. Ct. App. 2001).



lisher sought to unseal records indicating the settlement terms reached between a school district's insurer and a 15-year-old student athlete who was violently sexually assaulted on campus by three of his teammates.<sup>305</sup> The juvenile court found that the school had a "culture [of] raping-type activity" that the coaching staff "thought to be acceptable" and never challenged.<sup>306</sup> The student's attorney and the school district had held a news conference that revealed the existence of the settlement without disclosing the terms.<sup>307</sup> The terms, however, had been filed with the trial court in a petition for minor's compromise as required by statute, and the trial court approved the settlement.<sup>308</sup> The publisher sought specifically to unseal the amount of the settlement, but the district and the student argued that the student's privacy rights outweighed the public interest in the financial information. The district and student identified specific harm that the student would likely endure if the terms were disclosed:

They surmised "some people will make sick jokes and rude comments about this despicable act of rape, when it is coupled with the value of the settlement." The student's treating psychiatrist declared the student was further victimized and subjected to ridicule by published accounts of the assault and would suffer more harm if the settlement amount were disclosed.<sup>309</sup>

The publisher asserted that "the public was entitled to know the amount of the money paid in settlement because it reflected District's culpability."<sup>310</sup> The trial court declined to unseal the file, "finding the student's right to complete his high school education in the county and to participate in school athletics, along with his right of privacy about the 'sexual nature of the attack,' outweighed the right of public access to the court records."<sup>311</sup> While it claimed to be "sympathetic to the student's situation as a young crime victim," the appellate court granted the motion to unseal:

The fact of a damage award, whatever size, is not in itself a private fact deserving protection and secrecy in public education is not in the public interest. The settlement amount is not a trade secret, within a privilege, or likely to place anyone

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<sup>305</sup> Copley Press, Inc. v. Superior Court, 74 Cal. Rptr. 2d 69, 70 (Cal. Ct. App. 1998).

<sup>306</sup> *Id.* at 70.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 71.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

in "clear and present danger of attack." Nor is the amount itself the cause of the student's "mental anguish." . . . The student has not shown his interest in sealing the amount of the settlement, even temporarily, outweighs the public right of access to court records.<sup>312</sup>

The appellate court required the student to show compelling reasons why confidentiality was necessary, a burden that the court did not believe was met.<sup>313</sup>

Even under the proposed special balancing test, which begins with a strong presumption of access, this requirement of disclosure is likely the wrong result. This case is a good example of a situation where settlement confidentiality may be appropriate even where enumerated material is involved. Under the special test, the public's need for the information is strongly considered. The fact that a suit was filed and judicial resources were used to approve the settlement weigh in favor of access. The fact that the public already knew about the existence of the settlement due to the press conference would not necessarily preclude access to the financial information as alternative access is not weighed strongly. Additionally, the public has a strong interest in knowing how its public school funds are spent.

However, by focusing primarily on a party's interest in narrowly defined trade secrets and privileged information, the appellate court did not weigh strongly enough the student's psychological interest in confidentiality. Through expert testimony, the student indeed showed with evidentiary support a high probability that serious emotional harm would occur if the financial amount were revealed, as was recognized by the trial court. While monetary damage should be weighed more heavily than damage to one's reputation, the psychiatrist detailed severe emotional harm that would be suffered by the child in his daily school and sports environments. Due to the developmental importance of the school and sports environments to a child, such harm should be weighed more strongly than the daily discomfort an adult would feel at having his or her name tarnished. While the public certainly has a strong interest in knowing that a school tolerates a rape culture, the existence of the settlement was already revealed in the press conference. The information that parents would receive by knowing about the settlement's existence would be only slightly supplemented by knowledge of the financial information, which is not a

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<sup>312</sup> *Id.* at 74 (citations omitted).

<sup>313</sup> *Id.* at 72.

strong indicator of culpability due to the various practical reasons why parties settle.<sup>314</sup> As the student's identity was already widely known, there was no other way to protect him from additional harm due to the disclosure of the financial information other than to keep that information confidential. Thus, the public interest does not outweigh the student's interest in avoiding disclosure.

Again, most people would intuitively find that protecting this child from additional emotional harm is simply more important than obtaining marginally useful additional information about the settlement's financial terms. One cannot help but wonder if mere curiosity and the need for a compelling story prompted the press to seek the settlement amount.

#### *D. Employment Cases*

The primary question when applying the proposed rule to employment cases is whether sexual harassment cases would be subject to the special balancing test and a strong presumption of access. Generally, sexual harassment is indeed sexual predation – a person in power is taking sexual advantage of someone in an inferior position. Sexual predation need not be violent; rather, it can consist of the sexual coercion of a person with less capabilities or power by someone more capable or powerful. While this certainly describes a case in which a supervisor or other superior harasses a lower-level employee, even lateral harassment involves the abuse of social and psychological power. However, a judge may determine whether a sexual harassment case is predation based on the specific facts of the case, such as the power balance between the parties, whether touching or other physical threats were involved, the egregiousness of the harassing behavior, and whether the harassment alleged can be classified as *quid pro quo* or hostile work environment harassment.<sup>315</sup> While arguably this initial ambiguity may make it hard for people to predict a court's outcome regarding confidentiality, the fact that the case involves some type of sexual victimization would make it more reasonable to predict an out-

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<sup>314</sup> See Weinstein, *supra* note 29, at 61-62; Weinstein, *supra* note 143, at 517.

<sup>315</sup> For explanation of these two types of sexual harassment that are defined by Equal Employment Opportunity Commission ("EEOC") guidelines as being actionable under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000(e)-(h)-6 (2000), see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). *Quid pro quo* harassment occurs when a supervisor threatens to make an employment decision based on an employee's acquiescence to sexual demands. *Burlington Indus., Inc.*, 524 U.S. at 751. Hostile work environment harassment involves "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Id.* The terms "*quid pro quo*" and "hostile work environment" do not appear in the statute.

come of public access. However, neither the application of the general or the special balancing test would prevent confidentiality as even the strong presumption of access necessitated by the special test can be overcome if the facts of the case make disclosure inappropriate.

While employment sexual predation cases involve abuse of power, as do the clergy and education cases, the victimization of adults instead of children makes public access under the special test more likely in the employment context as concerns about emotional harm may not be as great. The public does have a strong interest in knowing which employers tolerate sexual predation so that communities can put pressure on companies to curb unacceptable behavior and so that individuals can make informed decisions about where to work and what businesses to patronize. However, the court may choose to use pseudonyms to protect a victim's future employment prospects, the victim's interest in which a court may consider to be monetary and thus more weighty than mere reputational concerns. If the court does not determine that the facts of the case do not qualify as predation, the parties' confidentiality agreement will likely be upheld as the public does not have a special need for the settlement information.

Additionally, all settlements with government employers will be subjected to the special balancing test because of the public's strong interest in government action and the expenditure of government resources.<sup>316</sup>

### *E. Product Liability and Mass Tort Cases*

In a hypothetical situation based loosely on the facts of *Chicago Tribune*,<sup>317</sup> an eighteen-year-old college football player dies as the result of injuries sustained in a roll-over automobile accident caused by tire tread separation, weather, and road conditions. While he was indeed driving his car over the speed limit, his driving was in no other way negligent. His parents sue the tire maker Bridgestone/Firestone and receive a sizable settlement before trial. Some pretrial motions were addressed by the court prior to settlement. The parties agree to confidentiality, and various members of the media intervene to obtain disclosure of the settlement terms. Due to the court's reference to the settlement in its dismissal of the

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<sup>316</sup> *E.g.*, *Herrnreiter v. Chi. Hous. Auth.*, 281 F.3d 634 (7th Cir. 2002) (involving an employment discrimination claim against the city housing authority); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (involving a § 1983 action regarding employment termination by a former vice president of a public college against the college).

<sup>317</sup> *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001).

case, the parties file the terms of the settlement with the court. It is argued that upon revelation, settlement details will be immediately disseminated by the media, and the public will exert huge pressure on the company to correct the defect and recall the dangerous products. Arguably, lives will be saved. This secret settlement is typical of the product liability settlements that confidentiality critics identify as being extremely harmful to the public. It involves a global company with far-reaching economic effects, a product that is widely used, and a defect that causes tragic results for people that use the product only as directed. Will such a settlement be disclosed under the proposed rule?

The special balancing test will be applied to this settlement due to the involvement of enumerated subject matter, that of product liability. In this hypothetical, judicial resources were spent to address pretrial motions, and thus the public interest is strong. The public interest is also strong as the disclosure of the settlement will very likely lead to widespread awareness about the tire problem. As the driving situation in which the accident occurred was in no way anomalous, similar accidents will likely occur. Any alternative means of obtaining the same public interest information, such as the current media attention and other court cases, need not be weighed heavily.

In favor of confidentiality and overcoming the presumption of access, the judge should consider less strongly the nature and magnitude of the harm that may result to the parties if confidentiality is not allowed. Here, the parents of the young driver would possibly suffer some social discomfort if the settlement is disclosed, but they would not likely suffer extreme additional emotional or reputational harm. Bridgestone/Firestone will certainly be exposed to bad publicity and possibly more lawsuits if the settlement is disclosed. Such bad publicity, however, is merely reputational harm to an entity, not personal grief suffered by an individual, and thus is not enough to overcome the strong public interest in the information. The monetary loss that the company might suffer due to lawsuits and to a recall is speculative and again is not likely enough to overcome the public interest. Neither party would likely be able to show with evidentiary support a high probability that harm will occur.

Bridgestone/Firestone may argue that the settlement may mislead the public and cause an unnecessary and debilitating panic about a widely used product. Again, this argument should be taken with a grain of salt. It is extremely far-fetched that people will stop using their cars due to the existence of one settlement and

that dissemination will thus debilitate the public; at most, people will replace their tires, and many people will simply get their tires checked. It is unlikely as well that the one case will prompt widespread panic that will force Bridgestone/Firestone to automatically recall the tires. It is a more likely scenario that public outcry will lead the company and consumer advocates to do prompt investigation to determine if a recall is appropriate. The public will likely be satisfied without a recall if prompt research is done to assure the public that the product is generally safe.

As it unlikely that the strong presumption in favor of access will be overcome in a typical product liability suit unless extreme circumstances exist, the proposed rule will likely satisfy many critics of confidentiality.

### CONCLUSION

A settlement is generally a private agreement between parties. Litigant privacy should be the primary interest protected in confidentiality analysis due to the practical reasons of settlement facilitation, to the historical function of courts, and to the parties' right to contract. Courts should not be able to intrude upon the terms of a settlement unless a party asks that a court somehow be involved. Once a court is involved, however, the public has an interest in the use of judicial resources. Courts have adopted varying procedures to determine when settlements should be disclosed to the public, and even courts that come to seemingly appropriate conclusions use inconsistent and unpredictable analyses. The proposed rule recognizes the importance of confidentiality overall and treats confidentiality as an overall default by not prohibiting confidential settlements for any case and by requiring case-by-case consideration. However, the rule also recognizes a public need for certain types of information.

In practice, the presumption of the special test may occasionally allow the public to have access to personal information, but this is the sacrifice necessary to permit public access to that information for which the public has a unique need. Conversely, the presumption of the general test may occasionally keep important information from the public, but this is the price necessary to ensure the preservation of litigants' rights, which should be weighed heavily in most cases.

This proposed rule comes to appropriate results when applied to situations that have repeatedly been identified by rule-makers and by scholars as problematic, including clergy sexual abuse cases and product liability cases. The rule's case-by-case ap-

proach and recognition of both the general need for confidentiality and the special needs of the public in certain cases addresses the concerns of both those that argue for confidentiality and those that argue for public access.

EMILY FIFTAL<sup>†</sup>

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<sup>†</sup> J.D. Candidate, 2004, Case Western Reserve School of Law.